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CASES

ON

ADMINISTRATIVE LAW

SELECTED FROM DECISIONS OF

ENGLISH AND AMERICAN COURTS

WITHDRAWN
L. A. CO. L. L

BY

ERNST FREUND
PROFESSOR OF LAW IN THE UNIVERSITY OF CHICAGO

AMERICAN CASEBOOK SERIES

JAMES BROWN SCOTT
GENERAL EDITOR

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THE AMERICAN CASEBOOK SERIES

For years past the science of law has been taught by lectures, the use of text-books and more recently by the detailed study, in the class-room, of selected cases.

Each method has its advocates, but it is generally agreed that the lecture system should be discarded because in it the lecturer does the work and the student is either a willing receptacle or offers a passive resistance. It is not too much to say that the lecture system is doomed.

Instruction by the means of text-books as a supplement or substitute for the formal lecture has made its formal entry into the educational world and obtains widely; but the system is faulty and must pass away as the exclusive means of studying and teaching law. It is an improvement on the formal lecture in that the student works, but if it cannot be said that he works to no purpose, it is a fact that he works from the wrong end. The rule is learned without the reason, or both rule and reason are stated in the abstract as the resultant rather than as the process. If we forget the rule we cannot solve the problem; if we have learned to solve the problem it is a simple matter to formulate a rule of our own. The text-book method may strengthen the memory; it may not train the mind, nor does it necessarily strengthen it. A text, if it be short, is at best a summary, and a summary presupposes previous knowledge.

If, however, law be considered as a science rather than a collection of arbitrary rules and regulations, it follows that it should be studied as a science. Thus to state the problem is to solve it; the laboratory method has displaced the lecture, and the text yields to the actual experiment. The law reports are in more senses than one books of experiments, and, by studying the actual case, the student co-operates with the judge and works out the conclusion however complicated the facts or the principles involved. A study of cases arranged historically develops the knowledge of the law, and each case is seen to be not an isolated fact but a necessary link in the chain of development. The study of the case is clearly the most practical method, for the student already does in his undergraduate days what he must do all his life; it is curiously the most theoretical and the most practical. For a discussion of the case in all its parts develops analysis, the comparison of many cases establishes a general principle, and

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the arrangement and classification of principles dealing with a subject make the law on that subject.

In this way TRAINING AND KNOWLEDGE, the means and the end of legal study, go hand and hand.

The obvious advantages of the study of law by means of selected cases make its universal adoption a mere question of time.

The only serious objections made to the case method are that it takes too much time to give a student the requisite knowledge of the subject in this way and that the system loses sight of the difference between the preparation of the student and the lifelong training of the lawyer. Many collections of cases seem open to these objections, for they are so bulky that it is impossible to cover a particular subject with them in the time ordinarily allotted to it in the class. In this way the student discusses only a part of a subject. His knowledge is thorough as far as it goes, but it is incomplete and fragmentary. The knowledge of the subject as a whole is deliberately sacrificed to training in a part of the subject.

It would seem axiomatic that the size of the casebook should correspond in general to the amount of time at the disposal of instructor and student. As the time element is, in most cases, a nonexpansive quantity, it necessarily follows that, if only a half to two-thirds of the cases in the present collections can be discussed in class, the present casebooks are a third to a half too long. From a purely practical and economic standpoint it is a mistake to ask students to pay for 1,200 pages when they can only use 600, and it must be remembered that in many schools, and with many students in all schools, the matter of the cost of casebooks is important. Therefore, for purely practical reasons, it is believed that there is a demand for casebooks physically adapted and intended for use as a whole in the class-room.

But aside from this, as has been said, the existing plan sacrifices knowledge to training. It is not denied that training is important, nor that for a law student, considering the small amount of actual knowledge the school can hope to give him in comparison with the vast and daily growing body of the law, it is more important than mere knowledge. It is, however, confidently asserted that knowledge is, after all, not unimportant, and that, in the inevitable compromise between training and knowledge, the present casebooks not only devote too little attention relatively to the inculcation of knowledge, but that they sacrifice unnecessarily knowledge to training. It is believed that a greater effort should be made to cover the general principles of a given subject in the time allotted, even at the expense of a considerable sacrifice of detail. But in this proposed readjustment of the means to the end, the fundamental fact cannot be overlooked that law is a developing science and that its present can only be understood through the medium of its past. It is recognized as imperative that a sufficient number of cases be given under each topic

treated to afford a basis for comparison and discrimination; to show the development of the law of the particular topic under discussion; and to afford the mental training for which the case system necessarily stands. To take a familiar illustration: If it is proposed to include in a casebook on Criminal Law one case on abortion, one on libel, two on perjury, one on larceny from an office, and if in order to do this it is necessary to limit the number of cases on specific intent to such a degree as to leave too few on this topic to develop it fully and to furnish the student with training, then the subjects of abortion, libel, perjury, and larceny from an office should be wholly omitted. The student must needs acquire an adequate knowledge of these subjects, but the training already had in the underlying principles of criminal law will render the acquisition of this knowledge comparatively easy. The exercise of a wise discretion would treat fundamentals thoroughly: principle should not yield to detail.

Impressed by the excellence of the case system as a means of legal education, but convinced that no satisfactory adjustment of the conflict between training and knowledge under existing time restrictions has yet been found, the General Editor takes pleasure in announcing a series of scholarly casebooks, prepared with special reference to the needs and limitations of the class-room, on the fundamental subjects of legal education, which, through a judicious rearrangement of emphasis, shall provide adequate training combined with a thorough knowledge of the general principles of the subject. The collection will develop the law historically and scientifically; English cases will give the origin and development of the law in England; American cases will trace its expansion and modification in America; notes and annotations will suggest phases omitted in the printed case. Cumulative references will be avoided, for the footnote may not hope to rival the digest.

The law will thus be presented as an organic growth, and the necessary connection between the past and the present will be obvious.

The importance and difficulty of the subject as well as the time that can properly be devoted to it will be carefully considered so that each book may be completed within the time allotted to the particular subject.

It is equally obvious that some subjects are treated at too great length, and that a less important subject demands briefer treatment. A small book for a small subject.

In this way it will be alike possible for teacher and class to complete each book instead of skimming it or neglecting whole sections; and more subjects may be elected by the student if presented in shorter form based upon the relative importance of the subject and the time allotted to its mastery.

Training and knowledge go hand in hand, and Training and Knowledge are the keynotes of the series.

If it be granted that all, or nearly all, the studies required for admission to the bar should be studied in course by every student—and the soundness of this contention can hardly be seriously doubted—it follows necessarily that the preparation and publication of collections of cases exactly adapted to the purpose would be a genuine and by no means unimportant service to the cause of legal education. And this result can best be obtained by the preparation of a systematic series of casebooks constructed upon a uniform plan under the supervision of an editor in chief.

For the basis of calculation the hour has been taken as the unit. The General Editor's personal experience, supplemented by the experience of others in the class-room, leads to the belief that approximately a book of 400 pages may be covered by the average student in half a year of two hours a week; that a book of 600 pages may be discussed in class in three hours for half a year; that a book of 800 pages may be completed by the student in two hours a week throughout the year; and a class may reasonably hope to master a volume of 1,000 pages in a year of three hours a week. The general rule will be subject to some modifications in connection with particular topics on due consideration of their relative importance and difficulty, and the time ordinarily allotted to them in the law school curriculum.

The following subjects are deemed essential in that a knowledge of them (with the exception of International Law and General Jurisprudence) is universally required for admission to the bar:

Administrative Law.
Agency.
Bills and Notes.
Carriers.
Contracts.
Corporations.
Constitutional Law.
Criminal Law.
Criminal Procedure.
Common-Law Pleading.
Conflict of Laws.
Code Pleading.
Damages.
Domestic Relations.
Equity.
Equity Pleading.
Evidence.
Insurance.
International Law.
Jurisprudence.
Mortgages.
Partnership.
Personal Property, including the Law of Bailment.
Real Property. { 1st Year. / 2d " / 3d "
Public Corporations.
Quasi Contracts.
Sales.
Suretyship.
Torts.
Trusts.
Wills and Administration.

International Law is included in the list of essentials from its intrinsic importance in our system of law. As its principles are simple in comparison with municipal law, as their application is less technical,

and as the cases are generally interesting, it is thought that the book may be larger than otherwise would be the case.

As an introduction to the series a book of Selections on General Jurisprudence of about 500 pages is deemed essential to completeness.

The preparation of the casebooks has been intrusted to experienced and well-known teachers of the various subjects included, so that the experience of the class-room and the needs of the students will furnish a sound basis of selection.

While a further list is contemplated of usual but relatively less important subjects as tested by the requirements for admission to the bar, no announcement of them is made at present.

The following gentlemen of standing and repute in the profession are at present actively engaged in the preparation of the various casebooks on the indicated subjects:

George W. Kirchwey, Dean of the Columbia University, School of Law. *Subject, Real Property.*

Nathan Abbott, Professor of Law, Columbia University. (Formerly Dean of the Stanford University Law School.) *Subject, Personal Property.*

Frank Irvine, Dean of the Cornell University School of Law. *Subject, Evidence.*

Harry S. Richards, Dean of the University of Wisconsin School of Law. *Subject, Corporations.*

James Parker Hall, Dean of the University of Chicago School of Law. *Subject, Constitutional Law.*

William R. Vance, Dean of the George Washington University Law School. *Subject, Insurance.*

Charles M. Hepburn, Professor of Law, University of Indiana. *Subject, Torts.*

William E. Mikell, Professor of Law, University of Pennsylvania. *Subjects, Criminal Law and Criminal Procedure.*

George P. Costigan, Jr., Professor of Law, Northwestern University Law School. *Subject, Wills and Administration.*

Floyd R. Mechem, Professor of Law, Chicago University. *Subject, Damages.* (Co-author with Barry Gilbert.)

Barry Gilbert, Professor of Law, University of Illinois. *Subject, Damages.* (Co-author with Floyd R. Mechem.)

Thaddeus D. Kenneson, Professor of Law, University of New York. *Subject, Trusts.*

Charles Thaddeus Terry, Professor of Law, Columbia University. *Subject, Contracts.*

Albert M. Kales, Professor of Law, Northwestern University. *Subject, Persons.*

Edwin C. Goddard, Professor of Law, University of Michigan. *Subject, Agency.*

Howard L. Smith, Professor of Law, University of Wisconsin. *Subject, Bills and Notes.* (Co-author with Wm. Underhill Moore.)

Wm. Underhill Moore, Professor of Law, University of Wisconsin. *Subject, Bills and Notes.* (Co-author with Howard L. Smith.)

Edward S. Thurston, Professor of Law, George Washington University. *Subject, Quasi Contracts.*

Crawford D. Hening, Professor of Law, University of Pennsylvania. *Subject, Suretyship.*

Clarke B. Whittier, Professor of Law, University of Chicago. *Subject, Pleading.*

Eugene A. Gilmore, Professor of Law, University of Wisconsin. *Subject, Partnership.*

Joshua R. Clark, Jr., Assistant Professor of Law, George Washington University. *Subject, Mortgages.*

Ernst Freund, Professor of Law, University of Chicago. *Subject, Administrative Law.*

Frederick Green, Professor of Law, University of Illinois. *Subject, Carriers.*

Ernest G. Lorenzen, Professor of Law, George Washington University. *Subject, Conflict of Laws.*

William C. Dennis, Professor of Law, George Washington University. *Subject, Public Corporations.*

James Brown Scott, Professor of Law, George Washington University; formerly Professor of Law, Columbia University, New York City. *Subjects, International Law; General Jurisprudence; Equity.*

JAMES BROWN SCOTT,
General Editor.

WASHINGTON, D. C., January, 1911.

Following are the books of the Series now published, or in press:

Administrative Law
Bills and Notes
Carriers
Conflict of Laws
Criminal Law
Criminal Procedure
Damages
Partnership
Persons
Suretyship
Trusts
Wills and Administration

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CASES ON ADMINISTRATIVE LAW

INTRODUCTION

The subject of administrative law covers a number of topics, which in treatises and digests are generally divided between the law of public officers and the law of extraordinary legal remedies, but which will also be found treated incidentally under such various heads as municipal corporations, taxation, highways, elections, intoxicating liquors, nuisances, public health, public lands, etc.

The common element, which gives the subject its unity, is the exercise of administrative power affecting private rights, and the term "administrative law" has in relatively recent times gained acceptance as the best designation for the system of legal principles which settle the conflicting claims of executive or administrative authority on the one side, and of individual or private right on the other.[1]

The more general bearings of this branch of the law, from a constitutional and comparative point of view, have repeatedly engaged the attention of eminent publicists. E. Dicey, The Law of the Constitution, c. 12; E. M. Parker, 19 Harvard Law Review, p. 335; A. L. Lowell, Government of England, vol. 2, c. 52, pp. 489–504.

In France, the dissatisfaction and irritation caused by the resistance of a powerful and conservative judiciary to the policies of the government, before and at the time of the revolution, had given rise to a theory of separation of powers, according to which certain classes of controversies involving matters of public administration were withdrawn from the regular courts and assigned to distinct administrative tribunals.[2]

[1] See F. J. Goodnow, Comparative Administrative Law, N. Y., 1893 (reviewed in an article by the author of this collection in IX Political Science Quarterly, 403); F. J. Goodnow, Principles of Administrative Law in the United States, N. Y., 1905; B. Wyman, Administrative Law, St. Paul, 1903.

[2] The regular civil and criminal courts, however, likewise take cognizance of many causes of action involving the validity of administrative acts, so wherever prosecutions are instituted for penalties, where suits for damages are brought against public officers, and where the government seeks to condemn private property for public use.

This system of administrative jurisdictions subsequently spread to other parts of continental Europe, and it is natural that the existence of courts exclusively concerned with questions of administrative law should have given that department of law a recognized status in the jurisprudence of the continental states.

The common law, on the other hand, has never given to the public law a similar recognition as a distinct part of its system. While old established differences of judicature and procedure have served to mark off the criminal law from civil rights and remedies, there has been no similar line of demarcation for the public law, the very name of which has no place in the technical language of the common law. It was, however, inevitable that the common law, when applied to matters of public administration, should develop principles in many respects different from those governing ordinary private rights.

In the first place, important privileges and immunities were conceded to the Crown. It is true that the English law made no distinction between the proprietary and the governmental capacity of the Crown, but in so far as the Crown represented the executive government, the law of the Prerogative meant also an exemption of public rights from the ordinary rules of the common law.

In the second place, while the Crown did not identify itself with all its subordinate organs, and while therefore the liability of public officers was from the earliest times treated as a matter of common law, yet compensatory relief by actions for damages against officers came, generally speaking, to be confined to cases where the illegal act constituted trespass or conversion. Municipal corporations have generally been conceded immunity from liability where they act in a governmental and not in a proprietary capacity. The state and the general government have succeeded to the immunity of the Crown from being sued, and the creation of a statutory right to obtain pecuniary relief from the public treasury for losses suffered through administrative error or default is the exception and not the rule. As a consequence, the right to compensatory relief, which is the backbone of the common law, has only a very limited application in matters of public administration. See sections 33–41 of this collection.

In the third place, the right to specific relief is represented by the extraordinary legal remedies, supplemented by the slowly expanding jurisdiction of courts of equity to restrain administrative acts which are in violation of individual rights.

These extraordinary remedies differ in important particulars from other rights of action. They are not matter of absolute right, but are granted or refused by the courts according to a judicial discretion governed by considerations of public policy. See sections 62–64 of this collection.

Moreover, even in those states in which in ordinary civil controversies the forms of action have been reduced to one, there survives, as a needless legal archaism, the distinctiveness of the different extraor-

dinary legal remedies, with provinces in part mutually exclusive, and in part concurrent, differing in scope and application in the several states, with arbitrary boundary lines, sometimes due to historical misunderstandings, and in their aggregate furnishing a highly technical and not entirely adequate system of judicial control of administrative action. See sections 47–61 of this collection.

Every case, therefore, arising out of an administrative controversy involves in the first instance the question through which of the various forms of remedies relief must be sought.

There is no state in which the law grants, in general terms, a right to appeal to the courts from every administrative decision affecting individual rights, and alleged to involve either a misconstruction of law, or an erroneous finding of facts, or an abuse of discretion. Nor is such an appeal, as a rule, given by statutes creating new administrative powers, the legislatures being, generally speaking, content to leave the individual right of redress to the system of remedies which has been developed by the unwritten law.

If no remedy at all is available, it must be that the legislature has vested in an administrative authority a power of conclusive determination. Where such determination has the effect of impairing common-law rights, and not merely rights or privileges of legislative creation or subject to absolute legislative disposition, a constitutional question will arise, whether such determination satisfies the requirement of due process of law.

Since practically every act of exercise of administrative power must be authorized by legislation, the operation of general principles of administrative law is constantly affected, and frequently controlled, by the language of statutes. Questions of administrative law, in other words, often resolve themselves into questions of statutory construction. However, the constant recurrence of certain types of legislation has evolved principles of construction, which, in view of the rapid and enormous growth of public regulation of all kinds of interests, are as deserving of careful study as common-law principles.

The term "administrative law" is sometimes applied to all provisions of law regulating matters of public administration, such as civil service, elections, municipal government, schools, public revenue, or highways. In so far as such legislation involves problems of public policy and of administrative efficiency, it concerns the student of political science and of public administration. The chief concern of administrative law, on the other hand, as of all other branches of civil law, is the protection of private rights, and its subject-matter is therefore the nature and the mode of exercise of administrative power and the system of relief against administrative action. This limitation of the subject seems conformable to the prevailing usage and understanding in this country, while on the continent of Europe all positive statutory law is treated as belonging to the province of administrative law.

PART I

ADMINISTRATIVE POWER AND ACTION

CHAPTER I

EXECUTIVE, QUASI JUDICIAL, AND QUASI LEGISLATIVE FUNCTIONS

SECTION 1.—THE DUTY TO SEE THAT THE LAWS ARE EXECUTED

FIELD v. PEOPLE.

(Supreme Court of Illinois, 1839. 2 Scam. 79.)

WILSON, C. J.[1] * * * The general government differs from ours in its powers and attributes; and although we have adopted the common law of England, we have neither adopted the form of that government, nor recognised the principles upon which it is founded. According to the theory of that government, the king is the sovereign power of the state. When a question of prerogative, therefore, arises there, recurrence is had to the charters of the people's rights and liberties, to ascertain whether the right in question has been surrendered by the king to the people; and if the grant cannot be shown, the right is adjudged to the king, upon the principle that all rights of which he has not divested himself, by express grant to the people, come within his prerogative. But upon the principle of our government, that the sovereign power of the state resides in the people, and that only such powers as they have delegated to their functionaries can be exercised, where a claim of power is advanced by the executive, the question is, not whether the power in question has been granted to the people, but whether it has been granted to the executive; and if the grant cannot be shown, he has no title to the exercise of the power. * * *

The next grant of power relied on is that "the executive power of the state shall be vested in a Governor." This clause is treated by the court below as conferring numerous and ample powers upon the

[1] Only a portion of the opinion of Wilson, C. J., is here printed.

Governor. All that are usually denominated executive powers, by theoretical writers, are supposed to be included in this grant to the Governor, except such as are expressly conferred upon other departments. This, I think I shall be able to show, is a mistaken view of the subject. This clause, like the preceding ones, is a declaration of a general rule; and the same remarks are applicable to this, as a grant of power, that have been made in reference to them. It confers no specific power. What would have been its operation, if the Constitution had contained no specific enumeration of executive powers, is a very different question from that now presented, and might have admitted of a different answer. But it has been settled by the Supreme Court of the United States that an enumeration of the powers of a department of the government operates as a limitation and restriction of a general grant. * * *

This clause of the Constitution,[2] like those dividing the powers of government, and declaring the attributes of each, is the declaration of a general principle, which is "not to be regarded as a rule to fetter and control, but as matter merely declaratory and directory." It confers no specific powers, "nor does it enjoin any specific duty." "This power of general supervision," says an able commentator on American law, "is a duty enjoined on the federal and state executives." "It would be dangerous, however, to treat this clause as conferring any specific power which they would not otherwise possess. It is to be regarded as a comprehensive description of the duty of the executive to watch with vigilance over all the public interests." Walker's American Law, 103. The Governor is not to execute the laws himself, but is to see them executed. This duty is performed by lending the aid and power of the executive arm to overcome resistance to the law. The history of the federal and state governments affords practical expositions of this clause of the Constitution, in conformity with this construction. The executive is to see the laws executed, not as he may expound them, but as they may be expounded by those to whom that duty is intrusted. To the Legislature is delegated the authority to make the laws, to the courts the authority to expound them, and to the executive the authority to see them executed, as they are thus interpreted. His interpretation is proper only when specially required by law, or where the ordinary means are inadequate to the object of their design. But to assume the power of expounding, and also that of executing the law, would be a usurpation of the functions of the judiciary, and concentrating, in one department, powers expressly declared, by the Constitution, to belong to two separate and distinct departments. * * *[3]

[2] That the Governor shall see that the laws are faithfully executed.

[3] "It was urged at the bar that the Postmaster General was alone subject to the direction and control of the President, with respect to the execution of the duty imposed upon him by this law; and this right of the President is claimed, as growing out of the obligation imposed upon him by the Con-

SECTION 2.—POWERS OF SUPERVISION

STATE ex rel. IVES, Atty. Gen. v. KANSAS CENT. R. CO. et al.

(Supreme Court of Kansas, 1891. 47 Kan. 497, 28 Pac. 208.)

Application by the State, on relation of the Attorney General, for a peremptory writ of mandamus to compel the Kansas Central Railroad Company and the Union Pacific Railway Company to repair the tracks of the former company. Alternative writ quashed on motion of defendants.

The powers and duties of the board of railroad commissioners of the state, as prescribed by the statute, so far as necessary to be referred to in the determination of this case, are as follows:

"Par. 1328. Said commissioners shall have the general supervision of all railroads in the state operated by steam, and all express companies, sleeping-car companies, and all other persons, companies, or corporations doing business as common carriers in this state; and shall inquire into any neglect or violation of the laws of this state by any person, company, or corporation engaged in the business of transportation of persons or property therein, or by the officers, agents, or employés thereof; and shall also from time to time carefully examine and inspect the condition of each railroad in the state, and of its equipment, and the manner of its conduct and management, with reference to the public safety and convenience. Whenever, in the judgment of the railroad commissioners, it shall appear that any railroad corporation, or other transportation company, fails, in any respect or particular, to comply with the terms of its charter or the laws of the state, or whenever in their judgment any repairs are necessary upon its road, or any addition to its rolling stock, or any addition to or change of its stations or station-houses, or any change in its rates for transporting freight, or any change in the mode of operating its road and conducting its business, is reasonable and expedient in order to promote the security, convenience and accommodation of the public, said commissioners shall inform such corporation

stitution, to take care that the laws be faithfully executed. This is a doctrine that cannot receive the sanction of this court. It would be vesting in the President a dispensing power, which has no countenance for its support, in any part of the Constitution, and is asserting a principle which, if carried out in its results, would be clothing the President with a power entirely to control the legislation of Congress, and paralyze the administration of justice." Kendall v. United States, 12 Pet. 524, 612, 613, 9 L. Ed. 1181 (1838).

Under the power to take care that the laws be faithfully executed, the President may depute a United States marshal to protect the person of a justice of a federal court while engaged in the performance of his judicial duties. Cunningham v. Neagle, 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55 (1890).

of the improvement and changes which they adjudge to be proper, by a notice thereof in writing, to be served by leaving a copy thereof, certified by the commissioners' secretary, with any station agent, clerk, treasurer, or any director of said corporation, and a report of the proceedings shall be included in the annual report of the commissioners to the Governor. Nothing in this section shall be construed as relieving any railroad company, or other transportation corporation, from their responsibility or liability for damages to person or property." Act March 8, 1883, c. 124, § 5.

HORTON, C. J.[4] The question for our consideration in this case is not what power the Legislature of the state may delegate or confer upon the board of railroad commissioners, but what power is conferred by the existing statutes. It is contended upon the part of the state that the finding of the railroad commissioners of the 13th day of May, 1891, that the Kansas Central Railroad "is in an unsafe and dangerous condition for the transportation of persons and property by reason of the insufficient condition and weight of the iron rails in the tracks thereof," is final and conclusive upon the defendants and this court. Further, that the order of the commissioners, requiring the Kansas Central Railroad to be relaid with new rails of standard pattern, and of not less weight than 56 pounds to the lineal yard, is also final and conclusive; that, in proceedings in this court to compel a compliance with the order of the commissioners, the statute neither contemplates nor allows any issue to be made or inquiry had of the condition of the railroad examined by the commissioners, or of the reasonableness of the order made by them. The defendants claim that the order of the commissioners, under the terms of the statute, is advisory only. If the finding of the commissioners and their order is final and conclusive, this court has no power to hear or determine any issue of fact, except upon the allegation that the defendants have refused to comply with the order for repairs. If the finding and order of the commissioners are final and conclusive, this court, upon a railroad company refusing a compliance therewith, must at once, upon proper application being made, register the order and enforce the same literally.

The power which is claimed by the commissioners to be conferred upon them, so far as this case is concerned, must be found, if found anywhere, in section 5, c. 124, Sess. Laws 1883 (paragraph 1328, Gen St. 1889). The Legislature has not conferred upon the commissioners by said statute the power claimed. There is nothing in the statute which states, or can be construed to state, that the orders of the commissioners concerning repairs upon a railroad shall be final or conclusive, or that the courts must carry out their determinations or judgments. Upon the other hand, the statute provides only that whenever, in the judgment of the commissioners, any re-

[4] Only a portion of the opinion is printed.

pairs upon a railroad are demanded for the security, convenience, and accommodation of the public, they shall inform the railroad corporation of the improvements and changes which they adjudge to be necessary, and then report their proceedings to the Governor. Nowhere is it stated in the statute that the recommendations of the commissioners concerning repairs must be complied with nolens volens by the company; nor does the statute authorize the Governor to carry into execution the order of the commissioners. As to the necessary repairs of a railroad, the finding and order of the commissioners, under the statute, are advisory only—nothing more. The order cannot be enforced by the commissioners; it cannot be enforced by the Governor; and it cannot be enforced specifically by this or any other court. * * *

In the first report of the commissioners, their powers under said section 5 were very clearly and fully defined by them. They said: "The commissioners, under this section, have no power to enforce an order. They can simply advise the company in fault of the changes desired or deemed necessary. To have invested the commission with the power to enforce its own orders, it would have been necessary to have changed the character of the board and the scope of its functions and powers. It would have been necessary to have given to the commission all the powers of a court of chancery, to be exercised within the scope of its assigned duties, with such ministerial officers attached to the board as are usual and necessary to such tribunals, to execute its injunctions and mandates. It would have rendered it necessary to have instituted a formal investigation, upon proper complaint and notice to the company complained of, and the rendition of a formal judgment and decree upon the evidence which should be submitted to the board. Manifestly, in such case, it would have been improper for the board to have acted upon knowledge and information gathered from personal observation, or the ex parte statements of individuals, as much so as it would be for regularly organized courts to act judicially upon evidence which has never been disclosed to the opposite party to the suit. The supervisory powers of the commission would in such case extend only to such matters as should be formally brought before it by complaint, and no such complaint would be made until some one had become the suffering victim of some neglect, failure, or other violation of duty on the part of a railroad company. Thus the chief benefits which were intended to be secured by giving the commissioners general supervisory powers would be sacrificed by imposing upon them those limitations in the exercise of functions which are necessary to impress upon judicial decrees the weight and character of impartiality." First Annual Report of Railroad Commissioners for 1883, p. 4. * * *

It is an historical fact, well known by those who attended the session of the Legislature of 1883, and by those acquainted with the proceedings of that body, that there was a bitter contention among its

members as to what power should be conferred upon or delegated to the commissioners to be appointed under the act or bill then pending for adoption. A part of the members, under the lead of Hon. Eugene F. Ware and others, were favorable to the delegation to the commissioners and the court's full authority for the enforcement of their orders; others, and a majority, opposed the delegation of such power; and the result was that advisory action only on the part of the commissioners was provided for. The national interstate commerce act of February 4, 1887, differs widely from the act of 1883 of our Legislature, in expressly providing for writs of mandamus to be issued out of the United States Circuit Courts to compel railroad companies to comply with the orders of the national commission, and also for punishing in such courts railroad companies for violating or neglecting to obey any lawful order or requirement of the national commission. Volume 1, Interstate Commerce Commission Reports, 665-671. * * * [5]

[5] See State v. Johnson, 61 Kan. 803, 60 Pac. 1068, 49 L. R. A. 662 (1900) declaring the act establishing a court of visitation for the regulation of railroads unconstitutional, as commingling judicial and legislative powers.

See People v. New York, Lake Erie & Western Railroad Company, 104 N. Y. 58, 9 N. E. 856, 58 Am. Rep. 484 (1887): "In regard to the facts there is no dispute. A plainer case could hardly be presented of a deliberate and intentional disregard of the public interest and the accommodation of the public. The railroad commissioners have thought that it was essential for those purposes that a new and enlarged building for passengers and freight should be erected. That, it is true, was a question for them to decide. The statute (Laws 1882, c. 353) created a commission of 'competent persons'; required from them an official constitutional oath; assigned to them an office for the transaction of business; provided a clerk to administer oaths to witnesses, and a marshal to summon them; gave full power of investigation and supervision of all railroads and their condition, with reference not only to the security, but accommodation, of the public; and declared that whenever, in their judgment, it shall appear, among other things, that any addition to or change of the stations or station-houses is necessary to promote the security, convenience, or accommodation of the public, they shall give notice to the corporation of the improvements and changes which they deem to be proper, and, if they are not made, they shall present the facts to the Attorney General for his consideration and action, and also to the Legislature. All these things have been done. The commissioners have heard and decided. They can do no more. After so much preliminary action by a body wisely organized to exercise useful and beneficial functions, it might well be thought unfortunate that some additional machinery had not been provided to carry into effect their decision. By creating, the statute recognizes the necessity for such a tribunal to adjust conflicting interests and controversies between the people and the corporation. It has clothed it with judicial powers to hear and determine, upon notice, questions arising between these parties, but it goes no further. Its proceedings and determinations, however characterized, amount to nothing more than an inquest for information. We find no law by which a court can carry into effect their decision. At this point the law fails, not only by its incompleteness and omission to furnish a remedy, but by its express provision that no request or advice of the board, 'nor any investigation or report made by it,' shall have the effect to impair the legal rights of any railroad corporation. The Attorney General is given no new power. He may consider the result of the investigation made by the commissioners, and their decision, and so may the company; but we must look further for his right of action, and the corporation, disregarding the judgment of the commissioners, may continue the management of its business in its own way—may determine in its own discretion to

SECTION 3.—ORDERS OF INDIVIDUAL APPLICATION—ADMINISTRATIVE AND QUASI JUDICIAL DETERMINATIONS

FULLER et al. v. COUNTY OF COLFAX.

(Circuit Court of United States, District of Nebraska, 1882. 14 Fed. 177.)

On motion to remand cause to state court.

DUNDY, District Judge. This cause was removed into this court from a state court held within and for Colfax county. The defendant moves to remand the same, for the reason that the suit was removed from an appellate court and not from the one in which the suit

what extent, and in what manner, the exercise of a public trust requires it to subserve the 'security, convenience, and accommodation of the public.'"

Section 6 of the New York act of 1882, above referred to, was subsequently changed, so as to read as follows: "If in the judgment of the board, after a careful personal examination of the same, it shall appear that repairs are necessary upon any railroad in the state, or that any addition to the rolling stock, or any addition to or change of the station or station-houses, or that additional terminal facilities shall be afforded, or that any change of the rates of fare for transporting freight or passengers or in the mode of operating the road or conducting its business, is reasonable and expedient in order to promote the security, convenience and accommodation of the public, the board shall give notice and information in writing to the corporation of the improvements and changes which they deem to be proper, and shall give such corporation an opportunity for a full hearing thereof, and if the corporation refuses or neglects to make such repairs, improvements and changes, within a reasonable time after such information and hearing, and fails to satisfy the board that no action is required to be taken by it, the board shall fix the time within which the same shall be made, which time it may extend. *It shall be the duty of the corporation, person or persons owning or operating the railroad to comply with such decisions and recommendations of the board as are just and reasonable.* If it fails to do so the board shall present the facts in the case to the Attorney General for his consideration and action, and shall also report them in its annual or in a special report to the Legislature."

New York Railroad Law (Laws 1890, c. 565) § 161.

See People ex rel. Linton v. Brooklyn Heights R. Co., 172 N. Y. 90, 64 N. E. 788 (1902). The way to compel action by railroad corporations is by first applying to the railroad commissioners, and not by judicial proceedings in the first instance.

FIFTEENTH ANNUAL REPORT OF THE INTERSTATE COMMERCE COMMISSION FOR THE YEAR 1901.

Complaints.

The work of the Commission which pertains directly to regulation involves two distinct kinds of procedure: One based upon formal petitions filed with the Commission under section 13 of the law, and involving regular hearing and investigation, the preparation of a report setting forth the material facts found and conclusions reached by the Commission, and issuance of an order dismissing the case or directing the carrier or carriers complained against to correct the rate or practice which may be held unlawful. The other kind of procedure arises in the performance by the Commission of its duty, under the twelfth section, to "execute and enforce the provisions of the act," and

was brought.[6] If this be true it must, of necessity, be decisive of the motion.

In considering the motion two questions arise—First, is a board of county commissioners a court within the meaning of the removal acts of Congress; and, second, is a mere claim for damages for right of way for a public road, presented to the county board, a suit within the meaning of the said removal acts, so long as the claim there remains for consideration.

The state law provides for paying for the right of way necessary in locating all public roads. If damages are sustained by the owners of land through which a road is located, the county is primarily liable therefor, and the manner of making the claim as well as the mode of making the payment is here perfectly well understood. After the location of the road all that seems to be necessary for the injured party to do is to make known to the county board the fact that damages are claimed for the right of way. If the claim is thought to be just and reasonable the county board allows it, and draws warrants on the county treasurer for the amount of damages awarded. If the claimant should be dissatisfied with the amount of damages so awarded him, he can appeal to the district court of the proper county, where the case is to be tried de novo. Thus it will be seen that the remedy provided by law in cases like the present one is alike speedy, efficacious, inexpensive.

The plaintiffs were damaged, as they claim, in consequence of a public road being located through their lands; and they presented to the county board a claim in the sum of $5,000 therefor. The board reduced the claim, or sum allowed, to $250, and the claimants appealed to the district court, all of which was done in strict accord-

relates to complaints presented by letter, the examination of tariffs on file in the office in connection with such complaints, and correspondence with shippers and carriers concerning the same. Complaints of the latter class are called informal complaints, to distinguish them from the formal petitions or complaints which constitute the basis of contested cases.

No order can be issued upon an informal complaint and inquiry. The main object of that method of procedure is the speedy disposition, through settlements, readjustments plainly required by the statute, or advice given by the Commission, of matters in which regulation is demanded, and thus to limit the number of contested cases upon the docket. It would be an injustice to complaining shippers and communities, amounting frequently to denial of relief, to compel the institution of a regular proceeding every time cause of complaint is brought to the attention of the Commission; and the number of cases requiring the hearing of witnesses, oral or written argument, and formulated decision would probably be greater than the Commission could dispose of properly or without intolerable delays. The great mass of complaints are handled and disposed of by the Commission by preliminary investigation and correspondence or conference with carriers and shippers. The matters considered and acted upon in this way range from overcharges upon small shipments to rate relations affecting the interests of entire communities, and are of the same nature as those which find their way to the regular case docket of the Commission.

[6] Act Cong. March 3, 1875, c. 137, § 3, provided that the petition for removal must be filed "in such suit in such state court before or at the term at which said cause could be first tried and before the trial thereof."

ance with the law. In presenting a claim to the county board for allowance, no formal proceedings are at all necessary, no pleadings of any sort are required to be filed, no process issued for any purpose whatever connected with the matter, and no formal judgment follows either the rejection or allowance of a claim by the board. The claim, when so made, is simply audited, allowed, or rejected, as justice and reason seem to require. In case of an appeal to the district court, the appeal is docketed, and pleadings are filed, and the cause then in all respects proceeds in the usual and ordinary way. The cause is then, in every sense of the term, in a court, and is also, then, in every sense of the term, a suit.

Now, what is usually understood by the words "court" and "suit," where we find them in legislative enactments or in legal proceedings? Blackstone says a "court is a place wherein justice is judicially administered." To administer justice judicially, there must be a judge, and usually, though not always, there are also other officers, such as clerk and sheriff or marshal. That also implies the right to issue compulsory process to bring parties before the court, so that jurisdiction may be acquired over the person or property which forms the subject-matter of the controversy. To administer justice judicially two parties to a controversy must exist; there must be a wrong done or threatened, or a right withheld, before the court can act. Then a hearing or trial follows, and the "justice to be judicially administered" results in a formal judgment for one of the parties to the controversy. The judgment to be pronounced usually has full binding force, unless modified or reversed. The courts can issue the proper process to carry their judgments into effect, and in that way subserve the great ends of their creation. But this is not so with the county boards in this state. They are not clothed with the necessary power to issue compulsory process to bring parties litigant before them. They cannot, in cases like the one under consideration, issue process to compel the attendance of witnesses. They cannot and do not enter formal judgments in cases presented to them for their consideration. They have no authority to execute any judgments if they should thoughtlessly undertake to enter them. They have but one party before them on whom their orders can operate. In short, the county board is so totally unlike a court, and so different in its constitution and its objects, that I am unable to see any similarity between them.

If the county board cannot be regarded as a court, it will follow as a necessary consequence that no suit was pending in this case until the appeal from the order of the board was filed and docketed in the district court. Two parties to a suit seem to be almost indispensable: one who seeks redress, and the other who commits a wrong or withholds what is justly due another. The parties must stand in such relation to each other that the machinery of the court will operate on them when their powers and their aid are invoked. No such a con-

dition of things existed so long as this claim remained before the county board. But when the appeal was taken, and docketed in the district court, we then for the first time find a suit pending in the court where none of the elements of either are wanting. It is such a suit that can be removed from such a court, as the removal acts of Congress contemplate.

I conclude, then, that the board of county commissioners of Colfax county is not a "court," and that this "suit" was never pending in any other court than the district court of Colfax county, from which it was removed to this court, and that it was, therefore, properly removed herein.

The motion to remand is overruled.[7]

McCRARY, Circuit Judge, concurs.

KENTUCKY & I. BRIDGE CO. v. LOUISVILLE & N. R. CO.

(Circuit Court of United States, District of Kentucky, 1889. 37 Fed. 567, 2 L. R. A. 289.)

JACKSON, Circuit Judge.[8] * * * In support of their position that judicial powers are conferred upon and exercised by the commission, counsel refer to various provisions contained in sections 12, 13, 14, 15, 16, 17, and 18 of the act [Act Feb. 4, 1887, c. 104, 24 Stat. 383-386 (U. S. Comp. St. 1901, pp. 3162-3168)], which, together with the rules of practice adopted, show, as they insist, that a proceeding before the commission, like the one in question, involves and embodies features and earmarks of judicial procedure and action in the following particulars, viz.: First, a petition, corresponding with the petition or bill in equity, is filed; second, notice is issued for, and service thereof made upon, the defendant or party complained of, conforming to, and corresponding with, the process of subpœna in courts of the United States, requiring such defendant to satisfy the complainant, or to appear and answer the same; third, the filing of defendant's answer, as in equity, which makes up or forms the issue; fourth, the issuance of subpœnas requiring the attendance of witnesses, or for the taking of depositions, upon the issues made up by the answer; fifth, the assignment of a time and place for the hearing, when and where the parties appear in person or by attorney, witnesses are sworn and examined, and arguments are made orally or by brief; sixth, when the conclusion is reached, a written report, corresponding in all re-

[7] "The right of appeal from the action of boards in their administrative character is frequently conferred by statute. The appeal in such cases is not permitted because the action of the board is considered judicial; but it is granted as a method of getting the matter involved before a court, that it may be determined judicially." Board of Commissioners of Huntington County v. Heaston, 144 Ind. 583, 591, 41 N. E. 457 (1895).

See, also, United States v. Ritchie, 17 How. 525, 15 L. Ed. 236 (1854).

[8] Only a portion of the opinion is printed.

spects to an opinion, is delivered, filed, and published; seventh, the order of the commission is recorded by its secretary, as decrees in equity are recorded by clerks of court; and, eighth, a copy of such order, under the seal of the commission, issues to the defendant, requiring obedience thereto.

This mode of procedure certainly conforms in many respects to the regular practice of courts, and is no doubt authorized by the law; but does it involve the performance of judicial acts, and the exercise of judicial powers, by the commission, as claimed? It is well settled that Congress, in ordaining and establishing "inferior courts," and prescribing their jurisdiction, must confer upon the judges appointed to administer them the constitutional tenure of office, that of holding "during good behavior," before they can become invested with any portion of the judicial power of the government; and if the act to regulate interstate commerce does in fact establish an inferior court, the commissioners appointed thereunder for certain fixed periods are clearly not such judges as can be invested with any portion of the judicial power of the United States, and their decision in matters affecting personal or property rights could have no force or validity. But does the interstate commerce law undertake either to create an "inferior court" or to invest the commission appointed thereunder with judicial functions? We think not. While the commission possesses and exercises certain powers and functions resembling those conferred upon and exercised by regular courts, it is wanting in several essential constituents of a court. Its action or conclusion upon matters of complaint brought before it for investigation, and which the act designates as the "recommendation," "report," "order," or "requirement" of the board is neither final nor conclusive; nor is the commission invested with any authority to enforce its decision or award. Without reviewing in detail the provisions of the law, we are clearly of the opinion that the commission is invested with only administrative powers of supervision and investigation, which fall far short of making the board a court, or its action judicial, in the proper sense of the term. The commission hears, investigates, and reports upon complaints made before it, involving alleged violations of or omission of duty under the act; but subsequent judicial proceedings are contemplated and provided for, as the remedy for the enforcement, either by itself or the party interested, of its order or report in all cases where the party complained of or against whom its decision is rendered does not yield voluntary obedience thereto. By the fourteenth and sixteenth sections of the act it is provided that the report or findings made by the commission "should thereafter, in all judicial proceedings, be deemed prima facie evidence as to each and every fact found."

The commission is charged with the duty of investigating and reporting upon complaints, and the facts found or reported by it are only given the force and weight of prima facie evidence in all such judicial proceedings as may thereafter be required or had for the

enforcement of its recommendation or order. The functions of the commission are those of referees or special commissioners, appointed to make preliminary investigation of and report upon matters for subsequent judicial examination and determination. In respect to interstate commerce matters covered by the law, the commission may be regarded as the general referee of each and every Circuit Court of the United States, upon which the jurisdiction is conferred of enforcing the rights, duties, and obligations recognized and imposed by the act. It is neither a federal court under the Constitution, nor does it exercise judicial powers, nor do its conclusions possess the efficacy of judicial proceedings. This federal commission has assigned to it the duties, and performs for the United States, in respect to that interstate commerce committed by the Constitution to the exclusive care and jurisdiction of Congress, the same functions which state commissioners exercise in respect to local or purely internal commerce, over which the states appointing them have exclusive control. Their validity in their respective spheres of operation stands upon the same footing. The validity of state commissioners invested with powers as ample and large as those conferred upon the federal commissioners has not been successfully questioned, when limited to that local or internal commerce over which the states have exclusive jurisdiction; and no valid reason is seen for doubting or questioning the authority of Congress, under its sovereign and exclusive power to regulate commerce among the several states, to create like commissions for the purpose of supervising, investigating, and reporting upon matters or complaints connected with or growing out of interstate commerce. What one sovereign may do in respect to matters within its exclusive control, the other may certainly do in respect to matters over which it has exclusive authority.

We are also clearly of opinion, that this court is not made by the act the mere executioner of the commissioner's order or recommendation, so as to impose upon the court a nonjudicial power. * * * The principle announced in these cases [9] would sustain counsel's position, if this court, under the provisions of the interstate commerce law, is limited and restricted to the mere ministerial duty of enforcing an order or requirement of the commission, whether it be regarded as a judicial or a nonjudicial tribunal. But such is not, in fact, the jurisdiction which this court is called upon to exercise. The suit in this court is, under the provisions of the act, an original and independent proceeding, in which the commission's report is made prima facie evidence of the matters or facts therein stated. It is clear that this court is not confined to a mere re-examination of the case as heard and reported by the commission, but hears and determines the cause de novo, upon proper pleadings and proofs, the latter including not only

[9] Hayburn's Case, 2 Dall. 409, 1 L. Ed. 436 (1792); U. S. v. Ferreira, 13 How. 40, 14 L. Ed. 42 (1851).

the prima facie facts reported by the commission, but all such other and further testimony as either party may introduce, bearing upon the matters in controversy. The court is empowered "to direct and prosecute, in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition; and on such hearing the report of said commission shall be prima facie (not conclusive) evidence of the matters therein stated." No valid constitutional objection can be urged against making the findings of the commission prima facie evidence in subsequent judicial proceedings. Such a provision merely prescribes a rule of evidence clearly within well-recognized powers of the Legislature, and in no way encroaches upon the court's proper functions.[10]

HARTMAN v. MAYOR, ETC., OF CITY OF WILMINGTON.

(Superior Court of Delaware, 1894. 1 Marv. 215, 41 Atl. 74.)

Certiorari by Maria C. Hartman against the Mayor and Council of City of Wilmington to review proceedings of a municipal board of health. Exceptions dismissed.

The plaintiff was the owner of a dwelling house in the city of Wilmington, against which proceedings were taken by the board of health for the abatement of an alleged nuisance resulting from a wet cellar. The record upon which certiorari issued simply disclosed that the executive officer of the board of health reported the following nuisance (among others): "M. C. Hartman, 705 South Harrison St., wet cellar." The provisions of the statutes, charter, and ordi-

[10] See Sidney and Beatrice Webb, The Parish and the County, p. 419: "Neither the individual magistrate nor the divisional sessions made any distinction between (1) a judicial decision as to the criminality of the past conduct of particular individuals; (2) an administrative order to be obeyed by officials; and (3) a legislative resolution enunciating a new rule of conduct to be observed for the future by all concerned. All alike were, in theory, judicial acts. Though many of these orders were plainly discretional, and determined only by the justices' views of social expediency, they were all assumed to be based upon evidence of fact, and done in strict accordance with law."

Id. p. 309: "And though, under particular statutes, individual justices or pairs of justices could appoint parish officers, allow their accounts, authorize rates, direct the mending of founderous roads, order relief to a destitute person, command a father to pay a weekly sum for the maintenance of a bastard, apprentice a poor child, or remove a pauper to his place of settlement, the fact that there was in all these cases a right of appeal to the Superior Court of Quarter Sessions indicates that, in the eye of the law 'our county rulers have been, not prefects controlled by a bureau, but justices controlled by a court of law'; that even their apparently executive duties had to be done 'with judicial forms and in a judicial spirit'; and that their most discretional orders partook of the nature of judicial decisions, to be given only on evidence, and 'according to the straight rule and course of the law.'"

See La Croix v. County Commissioners, 50 Conn. 321, 324, 325, 47 Am. Rep. 648 (1882).

nances bearing upon the subject are referred to in the argument of counsel.

CULLEN, J. This is a certiorari under very peculiar circumstances, and we will not attempt to go into any extended review of the different matters and principles upon which this case rests, but shall merely state the general principles involved, upon which we dismiss these exceptions.

It appears that there was a proceeding originally commenced under an act of assembly vesting in the board of health of this city certain powers and authority in relation to matters mentioned under their immediate jurisdiction. The result of the action of the board of health is not a judgment. This is a power that is conferred and which is acted on by the board of health by force of the police power, which is part of the sovereignty of the state. The state may delegate those powers, and it has in this case delegated to the board of health the power, upon complaint coming before them, to determine whether or not a thing is deleterious or injurious to the community generally; and they may examine that matter, and inquire into and investigate it. And upon this investigation, if the person upon due notice does not remove that which is deleterious—you may call it a nuisance—then the board of health have the right to remove or abate the nuisance.

It is contended that there was no notice given in this case before they proceeded. Every person, of course, has his right to a day in court; but the board of health act upon these matters like a grand jury, for instance, where there is a charge against a person—on one side of the matter. When the matter is determined by them, it is not a judgment. They simply determine that a certain matter is a nuisance. Then, when it is so determined, it is their duty to notify the party that a nuisance exists on his premises, and that he is required to remove it within a certain time, which is by them specified. The act does not prescribe a particular time in which it must be done, because the time it takes to remove it must necessarily depend upon the nature and character of the nuisance to be abated. Five days might be enough in one case, while it might take two, three, five, or six months in another.

When it is determined by the board of health, acting under the police power vested in them by the Legislature or the sovereign power of the state, that a certain thing is a nuisance, it becomes their duty for the first time to notify the party of the fact that a nuisance exists on his place; that is, notice is given to him of that fact. It is nothing more or less, in our judgment, than that "a nuisance exists on your place, and we require you to remove it in so many days." The party's rights have not been invaded. It has been a mere matter of investigation. And then he may, if he see fit, have his day in court. He has an impartial, full, and complete remedy. For the first time the case enters into trial when both parties are represented. He may

appeal to the chancellor for an injunction to stay the action, and commence an action whereby his rights may be determined by proceedings in chancery. If he sees fit to allow the matter to go on, and if the board of health have violated the powers vested in them in removing the matter, then they become personally liable.

Were it otherwise, what would become of the community, and what would police regulations amount to? Parties must act in an emergency. If the board of health act in an emergency, still there is time left for the opposite party, if he wishes, to contest their action. Their action is not a legal judgment, such as is contemplated under the law, to which a certiorari at common law may issue.

We think, therefore, under the circumstances, that this is not a case in which a certiorari would lie, and therefore dismiss the exceptions.

SECTION 4.—SAME—ENFORCING AND DIRECTING POWERS

COXE BROS. & CO. v. LEHIGH VALLEY R. CO.

(Interstate Commerce Commission of the United States, 1891. 4 Interst. Com. R. 535, 576.)

MORRISON, Commissioner.[11] * * * After submitting the proposed findings of fact for the consideration of the Commission, counsel for complainants in his concluding argument said: "As to the unreasonableness of the charge, we ask the Commission to find that the rate of $1.80 is unreasonable within the statute. We do not ask or care about your honor's establishing any particular rate. * * * There are a great many ways in which these coal rates can be determined without fixing any arbitrary or inflexible standard. * * * If they [the carriers] are informed that their present rate is unreasonable, they will then meet the individual operators of their districts in consultation, and I am sure some amicable arrangement will be reached by which both parties can make money." * * *

. Counsel for the road said in reply; "That will not do. If this Commission says that the present rates are unreasonable, they must say so because there is a different rate they have determined to be a proper one. It will not do for you to make a general finding and to say: 'The present rates are unreasonable, but we do not know what they ought to be. We cannot fix them for you. You must agree upon them amongst yourselves.' If unreasonable, say to what extent they are unreasonable—whether to the extent of a cent, or of many cents, or of a dollar, a ton. Would it be proper for you to lay

[11] Only a portion of the opinion is printed.

down an abstract principle that would lead to endless confusion in the application? That would put all at chaos. For Heaven's sake do not ever make the matter of the proper rates for carrying coal one to be regulated in a conference between the carrier and the shipper. If you have been convinced by these petitioners that the present rates are unreasonable and unjust, then say what the rates ought to be."
* * *

Having declared the rates in question to be unreasonable, if we should act upon the suggestion of counsel for complainants and fix upon none which may be properly charged, the case before the Commission would be at an end when the railroad company was notified that its rates were found to be excessive and must be modified. The Commission having prescribed no measure of reduction, any modification made in good faith would be a compliance with the required modification, yet it might be unsatisfactory to complainants and other operators and fall short of what the law requires. Then the occasion would be presented when the operators and carriers might meet and amicably arrange what the charges should be in accordance with the suggestion of complainants' counsel.

In such a meeting or conference of operators and carriers, where possible conflict of interest and opinion could arise, it might and most likely would occur that no satisfactory arrangement would be reached, and another application to the Commission would be necessary to declare the reduced rates still unreasonable. This process would need to be repeated until the legal rate was established by successive reductions, made in compliance with a series of determinations of the Commission that the rates were unreasonable.

In the case under consideration suppose the facts to be, as claimed, that the charges are excessive as much or more than 50 cents. Under the rule suggested by complainants' counsel, when the rate was ascertained to be unreasonable it would be so declared, and left with the shipper and carrier for amicable arrangement. If for any reason no scale of charges was agreed upon the rate would remain for determination by the carrier whose rate is challenged. Under such a rule applied to the subject of this complaint five several proceedings would be necessary to establish the reasonable rate if in each proceeding the carrier deemed a 10-cent reduction sufficient. If, impressed with the belief that the existing rates were not exorbitant, the carrier should attempt compliance with the Commission's conclusion that they were excessive by making the least possible reductions, repeated and continual applications would be necessary to correct a single abuse. Certainly Congress intended no such absurdity as this; but, as insisted upon by counsel for the road, when we have been convinced that rates are unjust, it will be our duty to say what they ought to be, or at least to determine upon some rate, any charge in excess of which would be unreasonable. If the duty of the Commission in respect to unjust and unlawful rates ends when it has been convinced that rates

are unreasonable, and so decided them to be, and for any reason the Commission may not determine what are, as well as what are not, reasonable, the regulation provided by the statute begins with complaint and ends in confusion.

The act to regulate commerce, which declares every unjust and unreasonable charge to be unlawful, and requires its provision to be enforced by the Commission, confers the power to determine, and imposes on the Commission the duty of determining, what are the reasonable rates which the charges may not exceed, as well as what are unreasonable. * * *

INTERSTATE COMMERCE COMMISSION v. CINCINNATI, N. O. & T. P. RY. CO.

(Supreme Court of United States, 1897. 167 U. S. 479, 17 Sup. Ct. 896, 42 L. Ed. 243.)

Mr. Justice BREWER delivered the opinion of the court.[12] * * *

It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future—that is a legislative act. Chicago, M. & St. P. Ry. Co. v. Minnesota, 134 U. S. 418, 458, 10 Sup. Ct. 462, 702, 33 L. Ed. 970; Reagan v. Trust Co., 154 U. S. 362, 397, 14 Sup. Ct. 1047, 38 L. Ed. 1014; Railway Co. v. Gill, 156 U. S. 649, 663, 15 Sup. Ct. 484, 39 L. Ed. 567; Cincinnati, N. O. & T. P. Ry. Co. v. Interstate Commerce Commission, 162 U. S. 184, 196, 16 Sup. Ct. 700, 40 L. Ed. 935; Texas & P. Ry. Co. v. Same, 162 U. S. 197, 216, 16 Sup. Ct. 666, 40 L. Ed. 940; Munn v. Illinois, 94 U. S. 113, 144, 24 L. Ed. 77; Peik v. Railway Co., 94 U. S. 164, 178, 24 L. Ed. 97; Express Cases, 117 U. S. 1, 29, 6 Sup. Ct. 542, 628, 29 L. Ed. 791.

It will be perceived that in this case the Interstate Commerce Commission assumed the right to prescribe rates which should control in the future, and their application to the court was for a mandamus to compel the companies to comply with their decision; that is, to abide by their legislative determination as to the maximum rates to be observed in the future. Now, nowhere in the interstate commerce act do we find words similar to those in the statute referred to, giving to the commission power to "increase or reduce any of the rates"; "to establish rates of charges"; "to make and fix reasonable and just rates of freight and passenger tariffs"; "to make a schedule of reasonable maximum rates of charges"; "to fix tables of maximum charges"; to compel the carrier "to adopt such rate, charge or classification as said commissioners shall declare to be equitable and reasonable." The power, therefore, is not expressly given. Whence then is it deduced?

[12] Only a portion of the opinion is printed.

In the first section it is provided that "all charges * * * shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful." Then follow sections prohibiting discrimination, undue preferences, higher charges for a short than for a long haul, and pooling, and also making provision for the preparation by the companies of schedules of rates, and requiring their publication. Section 11 creates the Interstate Commerce Commission. Section 12, as amended March 2, 1889 (25 Stat. 858), gives it authority to inquire into the management of the business of all common carriers, to demand full and complete information from them, and adds, "and the commission is hereby authorized to execute and enforce the provisions of this act."

And the argument is that, in enforcing and executing the provisions of the act, it is to execute and enforce the law as stated in the first section, which is that all charges shall be reasonable and just, and that every unjust and unreasonable charge is prohibited; that it cannot enforce this mandate of the law without a determination of what are reasonable and just charges, and, as no other tribunal is created for such determination, therefore it must be implied that it is authorized to make the determination, and, having made it, apply to the courts for a mandamus to compel the enforcement of such determination. In other words, that though Congress has not, in terms, given the commission the power to determine what are just and reasonable rates for the future, yet, as no other tribunal has been provided, it must have intended that the commission should exercise the power.

We do not think this argument can be sustained. If there were nothing else in the act than the first section, commanding reasonable rates, and the twelfth, empowering the commission to execute and enforce the provisions of the act, we should be of the opinion that Congress did not intend to give to the commission the power to prescribe any tariff, and determine what for the future should be reasonable and just rates. The power given is the power to execute and enforce, not to legislate. The power given is partly judicial, partly executive and administrative, but not legislative. Pertinent in this respect are these observations of counsel for the appellees:

"Article 2, § 3, of the Constitution of the United States, ordains that the President 'shall take care that the laws be faithfully executed.' The act to regulate commerce is one of those laws. But it will not be argued that the president, by implication, possesses the power to make rates for carriers engaged in interstate commerce. * * *

"The first section simply enacted the common-law requirement that all charges shall be reasonable and just. For more than a hundred years it has been the affirmative duty of the courts 'to execute and enforce' the common-law requirement that 'all charges shall be reasonable and just,' and yet it has never been claimed that the courts, by implication, possessed the power to make rates for carriers." * * *

We have, therefore, these considerations presented:

First. The power to prescribe a tariff of rates for carriage by a common carrier is a legislative, and not an administrative or judicial, function, and, having respect to the large amount of property invested in railroads, the various companies engaged therein, the thousands of miles of road, and the millions of tons of freight carried, the varying and diverse conditions attaching to such carriage, is a power of supreme delicacy and importance.

Second. That Congress has transferred such a power to any administrative body is not to be presumed or implied from any doubtful and uncertain language. The words and phrases efficacious to make such a delegation of power are well understood, and have been frequently used, and, if Congress had intended to grant such a power to the Interstate Commerce Commission, it cannot be doubted that it would have used language open to no misconstruction, but clear and direct.

Third. Incorporating into a statute the common-law obligation resting upon the carrier to make all its charges reasonable and just, and directing the commission to execute and enforce the provisions of the act, does not by implication carry to the commission, or invest it with the power to exercise, the legislative function of prescribing rates which shall control in the future.

Fourth. Beyond the inference which irresistibly follows from the omission to grant in express terms to the commission this power of fixing rates is the clear language of section 6, recognizing the right of the carrier to establish rates, to increase or reduce them, and prescribing the conditions upon which such increase or reduction may be made, and requiring, as the only conditions of its action—First, publication; and, second, the filing of the tariff with the commission. The grant to the commission of the power to prescribe the form of the schedules, and to direct the place and manner of publication of joint rates, thus specifying the scope and limit of its functions in this respect, strengthens the conclusion that the power to prescribe rates or fix any tariff for the future is not among the powers granted to the commission.

These considerations convince us that under the interstate commerce act the commission has no power to prescribe the tariff of rates which shall control in the future, and therefore cannot invoke a judgment in mandamus from the courts to enforce any such tariff by it prescribed.

But has the commission no functions to perform in respect to the matter of rates, no power to make any inquiry in respect thereto? Unquestionably it has, and most important duties in respect to this matter. It is charged with the general duty of inquiring as to the management of the business of railroad companies, and to keep itself informed as to the manner in which the same is conducted, and has the right to compel complete and full information as to the man-

ner in which such carriers are transacting their business. And, with this knowledge, it is charged with the duty of seeing that there is no violation of the long and short haul clause; that there is no discrimination between individual shippers, and that nothing is done, by rebate or any other device, to give preference to one as against another; that no undue preferences are given to one place or places or individual or class of individuals, but that in all things that equality of right, which is the great purpose of the interstate commerce act, shall be secured to all shippers. It must also see that that publicity which is required by section 6 is observed by the railroad companies. Holding the railroad companies to strict compliance with all these statutory provisions, and enforcing obedience to all these provisions, tends, as observed by Commissioner Cooley in Re Chicago, St. P. & K. C. Ry. Co., 2 Interst. Com. R. 231, 261, to both reasonableness and equality of rate, as contemplated by the interstate commerce act.

We have not overlooked the statute of Nebraska, nor the decision of the Supreme Court of that state in respect thereto. This statute was approved March 31, 1887, a few weeks after the passage of the interstate commerce act (Laws Neb. 1887, p. 540), and was obviously largely patterned upon that act. The general obligations incorporated into that act in respect to reasonableness of rates, prohibitions of discrimination, undue preferences, etc., are all in the Nebraska statute. A commission, called "a board of transportation," is also provided for (section 11), and is charged with the general duty of enforcing the act and supervising the railroad companies in the state. Section 17 which is more full and specific than any to be found in the interstate commerce act, provides that "said board shall have the general supervision of all railroads operated by steam in the state, and shall inquire into any neglect of duty or violation of any of the laws of this state by railroad corporations. * * * It shall carefully investigate any complaint made in writing, and under oath, concerning any lack of facilities, * * * or against any unjust discrimination against either any person, firm, or corporation or locality, either in rates, facilities furnished or otherwise; and whenever, in the judgment of said board * * * any change in the mode of conducting its business or operating its road is reasonable and expedient in order to promote the security and accommodation of the public, or in order to prevent unjust discriminations against either persons or places; it shall make a finding of the facts, and an order requiring said railroad corporation to make such repairs, improvements," etc.

In State v. Fremont, E. & M. V. R. Co., 22 Neb. 313, 35 N. W. 118, it appeared that the board of transportation had found that certain rates enforced upon the road of the defendant company were excessive, and that certain other rates, less than those in force, were reasonable and just. On application to the supreme court it was held that the state was entitled to a mandamus compelling obedience to such determination, the court observing (page 329, 22 Neb., and page 125, 35

N. W.): "In the case under consideration the board found that the rates and charges of the respondent were excessive; in other words, that there was unjust discrimination against that part of the state, and, having so found, the board is clothed with ample power to require such railway company to reduce its rates and charges. The power of the board, therefore, to establish and regulate rates and charges upon railways within the state of Nebraska is full, ample, and complete."

Without criticising in the least the logic of this decision, it is enough to say that it is based upon a section which gives wider and more comprehensive power to the supervising board than is given in the interstate commerce act to the commission, and does not justify the inference that the latter has the same power in respect to prescribing rates that by such decision was declared belonging to the Nebraska board of transportation.

Some reliance was placed in the argument on this sentence, found in the opinion of this court in Cincinnati, N. O. & T. P. Ry. Co. v. Interstate Commerce Commission, 162 U. S. 184, 196, 16 Sup. Ct. 700, 705, 40 L. Ed. 935: "If the commission, instead of withholding judgment in such a matter until an issue shall be made and the facts found, itself fixes a rate, that rate is prejudged by the commission as reasonable." And it is thought that this court meant thereby that, while the commission was not in the first instance authorized to fix a rate, yet that it could, whenever complaint of an existing rate was made, give notice and direct a hearing, and upon such hearing determine whether the rate established was reasonable or unreasonable, and also what would be a reasonable rate if the one prescribed was found not to be, and that such order could be made the basis of a judgment in mandamus requiring the carrier thereafter to conform to such new rate. And the argument is now made, and made with force, that, while the commission may not have the legislative power of establishing rates, it has the judicial power of determining that a rate already established is unreasonable, and with it the power of determining what should be a reasonable rate, and enforce its judgment in this respect by proceedings in mandamus.

The vice of this argument is that it is building up indirectly, and by implication, a power which is not, in terms, granted. It is not to be supposed that Congress would ever authorize an administrative body to establish rates without inquiry and examination; to evolve, as it were, out of its own consciousness, the satisfactory solution of the difficult problem of just and reasonable rates for all the various roads in the country. And, if it had intended to grant the power to establish rates, it would have said so in unmistakable terms. In this connection it must be borne in mind that the commission is not limited in its inquiry and action to cases in which a formal complaint has been made, but, under section 13, "may institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made." By section 14, whenever an investigation is made

by the commission it becomes its duty to make a report in writing, which shall include a finding of the facts upon which its conclusions are based, together with a recommendation as to what reparation, if any, ought to be made to any party or parties who may be found to have been injured. And by sections 15 and 16, if it appears to the satisfaction of the commission that anything has been done or omitted to be done in violation of the provisions of the act, or of any law cognizable by the commission, it is made its duty to cause a copy of its report to be delivered to the carrier, with notice to desist, and, failing that, to apply to the courts for an order compelling obedience.

There is nothing in the act requiring the commission to proceed singly against each railroad company for each supposed or alleged violation of the act. In this very case the order of the commission was directed against a score or more of companies, and determined the maximum rates on half a dozen classes of freight from Cincinnati and Chicago respectively, to several named Southern points and the territory contiguous thereto, so that if the power exists, as is claimed, there would be no escape from the conclusion that it would be within the discretion of the commission of its own motion to suggest that the interstate rates on all the roads in the country were unjust and unreasonable, notify the several roads of such opinion, direct a hearing, and upon such hearing make one general order, reaching to every road and covering every rate. It will never do to make a provision prescribing the mode and manner applicable to all investigations and all actions equivalent to a grant of power in reference to some specific matter not otherwise conferred. * * *

Our conclusion, then, is that Congress has not conferred upon the commission the legislative power of prescribing rates, either maximum or minimum or absolute. As it did not give the express power to the commission, it did not intend to secure the same result indirectly by empowering that tribunal to determine what in reference to the past was reasonable and just, whether as maximum, minimum, or absolute, and then enable it to obtain from the courts a peremptory order that in the future the railroad companies should follow the rates thus determined to have been in the past reasonable and just.

The question certified must be answered in the negative, and it is so ordered.[13]

Mr. Justice HARLAN dissented.

[13] Section 15 of the interstate commerce act of 1887 (Act Feb. 4, 1887, c. 104, 24 Stat. 384 [U. S. Comp. St. 1901, p. 3165]) read, until 1906, as follows: "If in any case in which an investigation shall be made by said commission it shall be made to appear to the satisfaction of the commission, either by the testimony of witnesses or other evidence, that anything has been done or omitted to be done in violation of the provisions of this act, or of any law cognizable by said commission, by any common carrier, or that any injury or damage has been sustained by the party or parties complaining, or by other parties aggrieved in consequence of any such violation, it shall be the duty of the commission to forthwith cause a copy of its report in respect thereto to be delivered to such common carrier, together with a notice to said common car-

ECKHARDT v. CITY OF BUFFALO.

(Supreme Court of New York, Appellate Division, Fourth Department, 1897. 19 App. Div. 1, 46 N. Y. Supp. 204.)

GREEN, J.[14] By section 237 of the city charter "the commissioner shall have full power to enforce and carry out all ordinances, rules and regulations for the preservation of the public health, * * * and in case any business or practice is dangerous or detrimental to the public health, to prohibit the same, and to declare unwholesome grounds, yards, cellars, buildings and other places, stagnant or unwholesome waters, filth and unwholesome matter injurious to health, to be nuisances, and upon so declaring, the commissioner shall have power to abate the same in such manner as he may deem expedient, and the expense may be assessed upon the lands upon or in front of which such nuisances were, or upon the parcels of land benefited by the abatement of the nuisance, as the common council shall direct." Laws 1891, c. 105.

rier to cease and desist from such violation, or to make reparation for the injury so found to have been done, or both, within a reasonable time, to be specified by the commission; and if, within the time specified, it shall be made to appear to the commission that such common carrier has ceased from such violation of law, and has made reparation for the injury found to have been done, in compliance with the report and notice of the commission, or to the satisfaction of the party complaining, a statement to that effect shall be entered of record by the commission, and the said common carrier shall thereupon be relieved from further liability or penalty for such particular violation of law."

This provision was changed by Act June 29, 1906, c. 3591, § 4, 34 Stat. 589 (U. S. Comp. St. Supp. 1909, p. 1158), as follows: "The commission is authorized and empowered, and it shall be its duty, whenever, after full hearing upon a complaint made as provided in section 13 of this act, or of any common carrier, it shall be of the opinion that any of the rates, or charges whatsoever, demanded, charged, or collected by any common carrier or carriers, subject to the provisions of this act, for the transportation of persons or property, * * * or that any regulations or practices whatsoever * * * affecting such rates, are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this act, to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged; and what regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed; and to make an order that the carrier shall cease and desist from such violation, to the extent to which the commission find the same to exist, and shall not thereafter publish, demand or collect any rate or charge for such transportation in excess of the maximum rate or charge so prescribed, and shall conform to the regulation or practice so prescribed. All orders of the commission, except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time not exceeding two years, as shall be prescribed in the order of the commission, unless the same shall be suspended or modified or set aside by the commission or be suspended or set aside by a court of competent jurisdiction."

Compare In re Janvrin, 174 Mass. 514, 55 N. E. 381, 47 L. R. A. 319 (1899); People, ex rel. Central Park, N. & E. R. Co. v. Willcox, 194 N. Y. 383, 87 N. E. 517 (1909); State v. Johnson, 61 Kan. 803, 60 Pac. 1068, 49 L. R. A. 662 (1900).

[14] The statement of facts and a portion of the opinion are omitted.

The question for determination is whether, under the general power to declare certain matters and things to be nuisances, and to abate the same in such manner as the official may deem expedient, the power may be implied to cause new erections to be made, new appliances, apparatus, and contrivances to be used, and new improvements to be adopted, all in accordance with supposed scientific principles of sanitation, and to charge the expense, however costly it may be, to the landowner, whether he will or no. The question is not whether the health commissioner had power to cause or order privies to be put into a proper and decent state, if not in that state; but is whether he has the right or power to force on the landowner the mechanical contrivance of water-closets, with all their requisites and accessories, instead of the privies, which, sufficient as privies, if kept in the condition proper for such conveniences, are on his lands for the purposes of his building there. * * *

Defendant relies upon the cases of Ex parte Saunders, 11 Q. B. Div. 191; Reg. v. Llewellyn, 13 Q. B. Div. 681; Reg. v. Wheatley, 16 Q. B. Div. 34; St. Luke's Vestry v. Lewis, 1 Best & S. 865; Hargreaves v. Taylor, 3 Best & S. 613. But the statutes under which these decisions were made expressly conferred upon the local authorities the important and extensive powers here claimed to exist by implication from the simple power to abate nuisances. The public health act provided that the local authority should serve on the owner or occupier of the premises on which the nuisance arises a notice requiring him to abate the same within a time specified, and to execute such works and do such things as may be necessary for that purpose. Upon default in complying with the requisitions of the notice, or if the nuisance, although abated, is, in the opinion of the local authority, likely to recur on the same premises, the latter shall complain to a justice, and the justice shall summon such person to appear before a court of summary jurisdiction. The court, if satisfied that the alleged nuisance exists, or that, although abated, it is likely to recur, shall make an order requiring such person to comply with all or any of the requisitions of the notice, or otherwise to abate the nuisance, within a time specified in the order, and to do any work necessary for that purpose. A penalty was imposed for noncompliance with the order. Other sections of the statute (which were not involved in any of these decisions) enabled the local authority to require particular things to be erected, by ordering that a sufficient water-closet, earth-closet or privy should be provided, "and the appeal against an order under those sections is to the central board, who have better capabilities of dealing with the propriety of such orders than the magistrates." Ex parte Whitchurch, 6 Q. B. Div. 545. It was held, however, that the order of the magistrates must specify what works and things the owner should execute and do for the purpose of not only abating the nuisance, but also to effectually prevent its recurrence. Reg. v. Wheatley, 16 Q. B. Div. 34. * * *

The decision in Ex parte Whitchurch has very pertinent application to a case where, as here, no express statutory power has been conferred upon the local sanitary authorities to direct the execution of such works, and to require such things to be done, as they may deem necessary to abate or remove the nuisance and also to effectually prevent its recurrence. It clearly indicates that, in the absence of any such legislative authority conferred, the acts of the health commissioner in this case were without legal sanction, and constituted a plain usurpation of power. And a reference to the English act and the decisions thereunder is important for various reasons. No such extensive powers as these existed at common law, and it was therefore deemed necessary or expedient to create and confer them by act of parliament. A mere general power to abate nuisances in such manner as the sanitary boards should deem expedient would hardly accomplish the purposes desired, or attain the beneficent objects within the contemplation of the Parliament. Nothing should be left to implication, but ample powers of regulation and direction should be conferred in express terms. The assumption or usurpation of power by the local authorities upon grounds of supposed expediency or necessity of the case ought not to be sanctioned, but the power should be expressly conferred. The right of landowners to manage, improve, or alter their property and buildings in such manner as they may deem fit and proper ought not to be interfered with or controlled by local officials, except in pursuance of legislative enactment conferring the power and regulating its exercise. The power should not be left to the local board to be exercised, mayhap in a capricious or arbitrary manner, and be summarily executed or enforced, but should be subject to the control and review of other and superior authorities or magistrates, and the landowner should have ample opportunity to be heard.

The conservation of public interests and the people's health and safety must be looked to, but, at the same time private rights of property must be guarded and protected against unwarrantable invasion, and the undue exercise of authority must be restrained within reasonable and proper bounds. These purposes were all intended to be accomplished by the public health act, and proper safeguards were provided for the landowner's protection. The sanitary commissioner has power to do no more than to require the abatement of the nuisance complained of; and, it may be, he may prescribe the particular mode of abating it, if that be the most effectual way of doing it. But he possesses no absolute power in that regard. Nor does it follow that he may direct important alterations and permanent improvements upon the premises, at a large expense to the owner, not demanded by the actual necessities of the case. There are no words in the charter to justify the contention that the owner of the premises may be required, in addition to abating the cause endangering the public health and safety, to make expensive improvements upon his property to suit the fancy of the official. His duty was, not to order the construction

of an entirely new privy, with all its connections and accessories, but simply to see to the amendment of the one existing. No attempt was made on the trial to show that the existing privy could not have been put in such condition for use as not to be a menace to health. The fact that a privy may not conform in all its appointments and accessories to the most approved modes of scientific, sanitary plumbing does not of itself condemn it as a nuisance.

The charter speaks only of abatement of nuisances, and the expense authorized relates to the work and labor necessary for the accomplishment of the purpose of removing or suppressing them, and not to the construction of something entirely new in lieu of the thing whose condition creates the nuisance. The nuisance complained of was the filthy condition of the privy vaults at the time of the determination that they were detrimental to health, but the large expense incurred had no relevancy to the abatement of that nuisance. It was not an incident to the removal of the cause of the nuisance, but, on the contrary, was for entirely new and independent work for the alteration and improvement of the plaintiff's premises. For this we find no authority in the charter. * * * [15]

[15] English Public Health Act, 1875, § 36: "If a house within the district of a local authority appears to such authority by the report of their surveyor or inspector of nuisances to be without a sufficient water-closet, earth-closet, or privy, and an ashpit furnished with proper doors and coverings, the local authority shall, by written notice, require the owner or occupier of the house, within a reasonable time therein specified, to provide a sufficient water-closet, earth-closet, or privy, and an ashpit furnished as aforesaid, or either of them, as the case may require. If such notice is not complied with, the local authority may, at the expiration of the time specified in the notice, do the work thereby required to be done, and may recover in a summary manner from the owner the expenses incurred by them in so doing, or may by order declare the same to be private improvement expenses."

"I take it to be fully established by the evidence before us that the order issued by the defendant proceeds upon the footing that there shall be no privies in their district, that all the privies there shall be turned into water-closets, and that this resolution has been come to before this order was issued, and without reference to the present case. * * * Now, whatever may be the powers given by this act to the local authorities to order water-closets to be provided instead of privies in particular cases in which that alteration may be required, * * * I think that, whatever may be the powers given, upon the true construction of the act, and viewing it in the light most favorable to these defendants, they were bound to exercise their discretion in each particular case, and that it was not competent to them to lay down any such general rule as that upon which the defendants acted, and that in acting upon that rule they have exceeded the powers given to them by the act, and that therefore this order was, in that respect, illegal and void, and that the defendants had not the power to enter upon the premises for the purpose of giving effect to this part of the order." Turner, L. J., in Tinkler v. Board of Works for Wandsworth District, 27 Law Journal (N. S.) Chancery, 342 (1857–58). See, also, U. S. Fidelity & Guaranty Co. v. Linehan, 73 N. H. 41, 58 Atl. 956, post, p. 607.

As to the difference between quasi judicial and quasi legislative orders, especially as regards the construction of statutes giving a right of appeal, see Nelson v. State Board of Health, 186 Mass. 330, 71 N. E. 693 (1904).

MORFORD et al. v. BOARD OF HEALTH OF ASBURY PARK.

(Supreme Court of New Jersey. 1898. 61 N. J. Law, 386, 39 Atl. 706.)

Certiorari by the State, on the prosecution of Harry W. Morford and others, against the Board of Health of Asbury Park, to review an ordinance of defendant. Judgment below set aside.

Argued November term, 1897, before VAN SYCKEL, DIXON, and COLLINS, JJ.

VAN SYCKEL, J.[16] The controversy in this case relates to the validity of the following ordinance, certified into this court:

"Be it ordained by the board of health of the borough of Asbury Park.

"Sec. 43. Every stable or building which may be hereafter constructed or reconstructed in the borough of Asbury Park, in which any horse, mule or cow is kept or stabled, shall be so constructed and drained that no fluids, excrement or refuse liquids shall flow upon or into the ground. All of the surface of the ground, beneath every stall, in every such building, and for a distance of at least four feet in the rear of every such stall, shall be covered and protected from pollution by a water-tight floor, or covering, which shall be constructed as follows: Where the said water-tight covering rests directly upon the ground surface, the said covering shall consist of concrete made with finely broken stone, one part; sharp sand, one part; hydraulic cement, one part, or coarse gravel, two parts; hydraulic cement, one part; to be laid at least three inches in thickness. Upon this concrete foundation a layer at least two inches in thickness of best asphalt, or a layer at least two inches in thickness of coal-tar concrete, or a layer at least two inches in thickness of cement concrete made with sharp sand, one part, best Imperial Portland cement, one part, shall be laid. When the water-tight covering is not in contact with the surface of the ground, it shall rest upon joist or floor beams three inches by ten inches, laid twelve inches from centers, and it shall consist of spruce or yellow pine planking, two inches thick and six inches wide, with beveled edges, and it shall be closely laid so that the joints shall be V-shaped, and be open at the top one-quarter of an inch. Said joints shall be calked with oakum and be made water-tight. Every such water-tight covering shall be laid upon a grade not less than one-eighth of an inch to each foot, and shall be so drained that all fluids which may fall upon it will be conveyed to a street sewer or otherwise disposed of subject to the terms of a permit from this board. Portable wooden racks shall be placed upon all such asphalt, coal-tar, concrete or cement concrete floors within said stalls. Said wooden racks or floor coverings shall be constructed of spruce strips, two inches in thickness, made in two sections and they shall be so placed that they may be readily removed for cleaning. * * *

[16] Only a portion of the opinion is printed.

Any person or persons or corporation who shall offend against any of the provisions of this section shall forfeit and pay a penalty of one hundred dollars."

The board of health derives its power from the following legislative acts: By the act of February 22, 1888 (2 Gen. St. p. 1642), boards of health are given power to adopt ordinances; to compel, prescribe, regulate, and control the plumbing, ventilation, and drainage of all buildings, public and private, and the connection thereof with outside sewers, cesspools, or other receptacles, etc.; and to secure the sanitary condition of all buildings, public and private. Again, by the act of March 29, 1892 (2 Gen. St. p. 1644), power is given to regulate the keeping of all kinds of animals, and to regulate and control the accumulating of offal, and to secure the sanitary condition of all public buildings, and to protect the public water supply, and to prohibit and remove any offensive matter or abate any nuisance in any place, public or private. The act of 1888 also requires plans for the plumbing, ventilation, and drainage of buildings to be submitted to the board of health for inspection and approval. While the courts fully recognize the importance of the powers granted to boards of health, and give them a liberal construction, such boards will be confined in their interference with the lawful business of any individual to such interruptions and regulations as may be reasonably necessary to enable them to abate any nuisance he may create in conducting it. Weil v. Ricord, 24 N. J. Eq. 169.

The prosecutors insist that the statutes under which boards of health are constituted do not empower them to prescribe the manner in which stable floors shall be laid with the strictness and particularity contained in the certified ordinance, and that it is therefore unreasonable and void. In Gregory v. Mayor, etc., 40 N. Y. 273, the board of health had power to carry into full execution whatever the health and safety of the citizens required. The New York court held that, in the exercise of such authority, the board could not order generally that all sinks and privies be removed as nuisances, but must find the existence of the nuisance as a fact, and exercise a specific judgment as to the necessity for removal. The Massachusetts statute in general terms authorizes the boards of health to order the owner or occupant of premises at his own expense to remove a nuisance. In Reservoir Co. v. Mackenzie, 132 Mass. 71, the supreme court denied the power of the board to prescribe the exclusive manner in which it should be removed, namely, by filling with gravel, earth, or some proper material, to the satisfaction of the board, flat lands which caused the alleged nuisance. The court declared that the owner had the right to adopt the alternative of excavating or dredging the flats, or keeping them covered with water. This ruling was in conformity to the view which prevailed in Salem v. Railroad Co., 98 Mass. 431, 96 Am. Dec. 650, where the owner was not restricted to the mode prescribed by the board of health for removing a nuisance. In Health Department v.

Lalor, 38 Hun, 542, the statute provided that the drainage and plumbing of all buildings should be executed in accordance with plans previously approved in writing by the board of health, and in consequence of such specific authority the owner of property was prohibited from departing from the plan so approved.

It is well settled that, in order to uphold the action of boards exercising a special statutory jurisdiction, authority for it must be found in the positive law. In our statutes, before referred to, the power is given in general terms to the board of health to pass ordinances to regulate the drainage of stables. There is no language which authorizes the board to prescribe a mode to which stable owners must rigidly conform. On the contrary, the act of 1888 expressly recognizes the right of the stable owner to submit plans for drainage to the board for approval, and this negatives the idea that an ordinance may lawfully be adopted which will deprive the owner of that privilege. The conclusion which results from this view of the statute is, not that the ordinance is void, but that the owner is not restricted to the manner of laying the floor which is prescribed by the ordinance. The ordinance stands as a protection to those who conform to it. If the owner secures the sanitary condition of his building by adopting some other plan, he is not amenable to prosecution. In departing from the directions contained in the ordinance, he takes the risk of creating a nuisance. If the plan he resorts to is a failure, he may be held for the penalty, not on the ground that he has not conformed to the plan specifically set out in the ordinance, but on allegation and proof that his stable is a nuisance.

Whether, in this case, the complaint is in such form, and the ordinance so framed, that upon proper proof the penalty could lawfully be imposed upon the owners of the stable, it is not necessary to decide. The justice before whom the proceedings below were had convicted the owners of the offense of violating the ordinance, and imposed the penalty for that alleged offense, and not for maintaining a nuisance. They may have violated the ordinance without committing the offense of creating a nuisance. No conviction could lawfully have been had except for maintaining a nuisance.

The judgment below must, therefore, be set aside.[17]

[17] Compare Durgin v. Minot, 203 Mass. 26, 89 N. E. 144, 24 L. R. A. (N. S.) 241 (1909).

SECTION 5.—SAME—CONDITIONS ANNEXED TO GRANT OF LICENSE

REG. v. BOWMAN et al., Justices.

(High Court of Justice, Queen's Bench Division. [1898] 1 Q. B. 663.)

Rules to justices for the borough of South Shields for a certiorari to bring up an order granting a license to one John Duncan to sell intoxicating liquors to be quashed, and for a mandamus to hold an adjournment of the general annual licensing meeting and hear and determine according to law an application by the said Duncan for a license.

At the general annual licensing meeting for the borough of South Shields held on August 25, 1897, John Duncan, who was at that time the holder of three licenses to sell intoxicating liquors within the borough, applied for a provisional full license to sell intoxicating liquors on certain premises then about to be erected. The hearing of the application was adjourned to September 29, when Henry Yooll and John George Patton, being inhabitants and ratepayers of the said borough, attended the licensing sessions and opposed the application. At a further adjourned session held on November 3 the chairman of the licensing committee stated that the justices had decided to grant the license on condition of the three existing licenses being surrendered and of a sum of £1,000. being paid by Duncan to the justices. The conditions having been performed, the license was granted, and the grant was subsequently confirmed. Messrs. Yooll and Patton thereupon obtained the above-mentioned rules for a certiorari and a mandamus on the ground that the justices in annexing the said conditions to the grant of the license were acting illegally and outside their jurisdiction.

It was admitted by them that it was the intention of the justices to apply the £1,000. so paid by Duncan in reduction of the rates of the borough, or for some other similar public purpose.

WILLS, J.[18] This is a case of considerable importance, but it is one which presents no difficulty as soon as the facts (which are not in dispute) are ascertained. It is clear that any member of the public has a right to be heard in opposition to an application for a license, and, having such a right, he is entitled to be heard according to legal principles. If the justices allow themselves to take into consideration matters which have no bearing upon the merits of the case before them, and which influence their minds in arriving at their decision, it cannot

[18] Parts of the opinions are omitted.

be said that the objector has been heard according to law. In the present case the justices stated that they were prepared to grant the license upon the terms that the three existing licenses then held by the applicant should be surrendered, and that he should further pay to them a sum of £1,000. for some public purpose.

As to whether the justices were entitled to attach the condition of the surrender of the old licenses I will express no definite opinion, though as at present advised I incline to the view that they might lawfully have done so, as the number of the licensed houses which the needs of the neighborhood demanded was one of the matters which they had to consider. But the condition of the payment of £1,000. was wholly unjustifiable. If authority were needed, it is enough to refer to the case, which was cited, of Rex v. Athay, 2 Burr. 653. The justices had no more right to require the payment of money for public purposes than to require that it should be paid into their own pockets. If the attachment of such a condition were allowed to pass without objection, there would soon grow up a system of putting licenses up to auction—a system which would be eminently mischievous and would open the door to the gravest abuses. No doubt the justices were acting in perfect bona fides and in the interests of the public. But their conduct was none the less illegal. There has been no real hearing, and the mandamus must therefore go. * * *

Darling, J. I entirely agree. The justices have here done a thing which in a few years' time they may perhaps be allowed to do.[19] They have sought to make vendors of intoxicating liquor, and through them the persons who indulge in it, bear more than their ordinary share of the public burdens. It has often been suggested that a law to that effect would be a very proper one to enact. But it is not law yet. If ever it is made the law it must be by the authority of Parliament, and when Parliament does so enact it will no doubt take care to specify the particular public objects to which the money is to be applied. The justices have here approached the consideration of the case with preconceived theories as to the proper distribution of the unearned increment of value arising from the grant of a license to particular premises, and have allowed those theories to influence their decision. Under those circumstances it is enough to refer to Reg. v. Adamson, 1 Q. B. 201, to show that a mandamus must be allowed. * * *

[19] The power was given by Licensing Act 1904, § 4.

VAN NORTWICK v. BENNETT.

(Supreme Court of New Jersey, 1898. 62 N. J. Law, 151, 40 Atl. 689.)

On certiorari to review the granting of a license to sell ale, etc., by the Monmouth pleas.

VAN SYCKEL, J. The defendant, Bennett, applied for a license to sell ale, strong beer, etc., under the act approved April 4, 1872 (Gen. St. p. 1797, pl. 60).

This application, as recommended by the ten freeholders [as required by the said act, and in due form], was for a license to sell in the place occupied by the petitioner, being the northwesterly side of the building erected on the southeasterly side of Shark river, between the county bridge and the railroad bridge.

When the application was presented to the Monmouth pleas there was a remonstrance against granting it. Thereupon the application was amended by restrictive words, defining the portion of the premises in which the license was to be used, and the following clause was inserted in the affidavit thereto: "This application is made with the express understanding that no open bar is to be maintained, and that the purpose of this license is to serve guests at table with meals."

The affidavit was not again taken after this alteration, nor did the freeholders who recommended the application sign the recommendation after the petition was altered.

The court granted a license to Bennett "with the express condition that no open bar was to be maintained, and that the purpose of the license was to serve guests at table with meals."

The act of 1872 prescribes the form of the license which the court may grant, which is "to sell malt liquors in the place which the applicant keeps." A license so granted authorizes the licensee to keep an open bar. From the fact that the court annexed to the license granted a condition that he should not keep an open bar, and should sell only with meals served, we must infer that in the exercise of its discretion the court decided that a license such as the statute authorizes should not be granted. The license granted is not authorized by the act of 1872, or by any other statute, and was not recommended by ten freeholders. The common pleas, therefore, had no jurisdiction or authority to grant such a license. A constituent essential to the jurisdiction of the court was absent, and that makes its action subject to review in this court, under the case of Dufford v. Nolan, 46 N. J. Law, 87.

The suggestion that the restriction imposed will be in the interest of good order cannot be considered. Licenses can be granted only in virtue of the statute. The Legislature alone prescribes the conditions and terms, and the common pleas is without power to depart from these provisions, and to say that, although the license provided by law ought not to be granted, it will issue some other license not authorized

by the act. The action of the court has no basis in legislation, and is therefore invalid.

The license certified is vacated and set aside.[20]

SECTION 6.—SAME—LICENSING POWER AND POWER TO REVOKE LICENSES

CITY OF LOWELL v. ARCHAMBAULT.

(Supreme Judicial Court of Massachusetts, 1905. 189 Mass. 70, 75 N. E. 65.)

Appeal from Superior Court, Middlesex County.

Bill in equity by the City of Lowell against one Archambault. From a decree for plaintiff, defendant appeals. Reversed.

BRALEY, J. This is a bill in equity, brought under Rev. Laws, c. 102, § 71, to enjoin the defendant from occupying and using a stable, in violation of the provisions of section 69 of the same chapter. In the superior court the case was submitted on agreed facts, and after a decree had been entered in favor of the plaintiff, it comes before us on the defendant's appeal.

It appears that the defendant, who is engaged in the business of an undertaker, desiring to erect on his land a stable to be used in

[20] Compare Chester v. Wabash, etc., Co., 182 Ill. 382, 55 N. E. 524 (1899), consent with a time limit held valid. As to the validity of consents given for a consideration, see Maguire v. Smock, 42 Ind. 1, 13 Am. Rep. 353 (1873); Howard v. First Indep. Church, 18 Md. 451 (1862); Doane v. Chicago City R. Co., 160 Ill. 22, 45 N. E. 507, 35 L. R. A. 588 (1895); Hamilton Traction Co. v. Parish, 67 Ohio St. 181, 65 N. E. 1011, 60 L. R. A. 531 (1902).

See Francis v. Francis, 203 U. S. 233, 242, 27 Sup. Ct. 129, 132, 51 L. Ed. 165 (1906): "It follows that the words in the patent of 1827, 'but never to be conveyed by them or their heirs, without the consent and permission of the President of the United States,' were ineffectual as a restriction upon the power of alienation. The President had no authority, in virtue of his office, to impose any such restriction; certainly not without the authority of an act of Congress, and no such act was ever passed."

See Sidney and Beatrice Webb, English Local Government, I, "The Parish and the County," p. 541: "The whole sphere of licensing afforded a wide opportunity for virtual legislation. We have sufficiently described elsewhere the extent to which the justices, at first in pairs and afterward in Brewster sessions, exercised their plain legal right to impose conditions on alehouse keepers seeking licenses, and to bind them over, by 'articles' attached to the statutory recognizances, to close at certain hours or on certain days, to follow this or that line of conduct, and to abstain from particular lawful acts of which these particular justices chose to disapprove."

As to the power of municipal corporations to annex conditions to their consent to the laying of railroad tracks or to the placing of other public utility appurtenances in the public streets, see Byrne v. Chicago General R. Co., 169 Ill. 75, 83–85, 48 N. E. 703 (1897); Allegheny City v. Millville, etc., Ry. Co., 159 Pa. 411, 28 Atl. 202 (1893), in favor of the power; Matter of King County Elevated R. Co., 105 N. Y. 97, 114, 13 N. E. 18 (1887) quære; State ex rel. v. City of Sheboygan, 111 Wis. 23, 86 N. W. 657 (1901), and Wisconsin Telephone Co. v. Milwaukee, 126 Wis. 1, 104 N. W. 1009, 1 L. R. A. (N. S.) 581, 110 Am. St. Rep. 886 (1905), against the power.

connection therewith, applied to the board of health for a license to permit him to occupy and use the building when completed for the stabling of eight horses. This petition was granted, and a license duly issued to him, permitting the exercise of this privilege. Upon receiving it, he at once had plans prepared, and began the erection of a stable on a site from which he had at a pecuniary loss removed another building. After the work had been begun, but before its completion, the board of health, acting on the petition of residents in the immediate vicinity, rescinded their former vote and canceled the license. Since the completion of the building the defendant has used it for the keeping of two horses, claiming this right under the license, which he contends never has been legally annulled. If the revocation was invalid, such use was not in violation of the statutory provision on which the plaintiff relies, and the bill cannot be maintained. The license granted under the police power of the commonwealth, as administered through the agency of the board of health, did not constitute a contract between him and the city, or confer upon him any vested right of property. Neither did its abrogation, if lawful, deprive him of any immunity or privilege conferred upon him by our Constitution. Calder v. Kurby, 5 Gray, 597; Newton v. Joyce, 166 Mass. 83, 44 N. E. 116, 55 Am. St. Rep. 385; Young v. Blaisdell, 138 Mass. 344.

The Statutes of 1895 (page 219, c. 213), now Rev. Laws, c. 102, §§ 69, 71, under the authority of which the board acted and the license was issued, contained no provisions for its recall when once granted. It evidently was the purpose of section 1 of the original act that the license itself should specify the extent of the right conferred, by setting out the conditions under which the building could be built and used; for by section 2 the board may make regulations respecting the occupation and use of stables in existence at the date of its passage, while the last section provided a penalty for the violation of the act itself, or of any order or regulation made pursuant to its requirements. Whether a stable was in existence and its use was to be continued, or permission was to be given to erect a stable and then use it, the right in each instance was subject to such reasonable regulations as might be made by the board of health. It undoubtedly was presumed that the board would make proper inquiries before judicially determining whether a license should or should not be refused, and, if granted, to prescribe by its terms how far the privilege might be exercised. In any instance, if the granting of a license would be detrimental to the public health, or contrary to regulations already established, then it would not be issued.

If the statute had given to the boards of health of cities a general authority similar to that conferred by Pub. St. 1882, c. 80, § 10,[21]

[21] This section provides that boards of health may exercise all the powers vested in, and shall perform all the duties prescribed to, city councils or mayors and aldermen as boards of health under the statutes and ordinances in force in their respective cities on May 17, 1877.

it might be that they lawfully could make the violation of their regulations a sufficient ground for revoking the privilege, and could issue it upon such a condition. Young v. Blaisdell, ubi supra; Grand Rapids v. Braudy, 105 Mich. 670, 677, 678, 64 N. W. 29, 32 L. R. A. 116, 55 Am. St. Rep. 472.[22] At least it could be said that the licensee then would take it subject to this reservation, and, having agreed to its terms, no injustice would be done by a subsequent cancellation. Generally, under statutes regulating the conduct of certain kinds of employment or of business which require the protection of a license before they can be lawfully prosecuted, the penalty of forfeiture is dealt with either by conferring express authority to revoke for violations upon the licensing board or some other tribunal, or else a general power is delegated, under which such a clause may be inserted in the license itself. Rev. Laws, c. 100, §§ 15, 47, 89; chapter 102, §§ 9, 28, 29, 33, 58, 72; Grand Rapids v. Braudy, ubi supra.

Upon application for permission to erect a stable, which, in the absence of a restricting statute, would be a legitimate improvement in the enjoyment of his property, the applicant is entitled to know the full measure of immunity that can be granted to him before making the expenditure of money required to carry out his purpose. A resort to the general laws relating to the subject, or to ordinances or regulations made pursuant to them, should furnish him with the required information. When this has been obtained, he has a right to infer that he can safely act, with the assurance that, so long as he complies with the requirements under which it is proposed to grant the privilege, he has a constitutional claim to protection, until the Legislature further restricts or entirely abolishes the right bestowed. Commonwealth v. Brennan, 103 Mass. 70; Commonwealth v. Kinsley, 133 Mass. 578, 579; Hirn v. State, 1 Ohio St. 20, 21; Schwuchow v. Chicago, 68 Ill. 444; Lantz v. Hightstown, 46 N. J. Law, 102, 107; Grand Rapids v. Braudy, ubi supra.

Independently of this statute, while the board of health, under Pub. St. 1882, c. 80, §§ 8, 12, after a hearing and on proper evidence, might have adjudged the defendant's building, when erected and occupied as a stable, detrimental to the public health, and therefore a nuisance, it had no jurisdiction to issue a license to him permitting and regu-

[22] Schwuchow v. City of Chicago, 68 Ill. 444, 449 (1873): "When the Legislature granted power to suppress groceries, they conferred power on the city which they might exercise even to that extent. The Legislature, then, having conferred such power, it was for the common council to determine whether they would wholly suppress the sale of intoxicating liquors, or grant the privilege on such terms and conditions as they might choose. And the power was ample, under this grant, to impose as a condition that, when a license is granted, it should be liable to revocation on the violation of the ordinances regulating the traffic, or, having absolute control over the whole subject of granting licenses, they may impose any other condition calculated to protect the community, preserve order, and to suppress vice." See Grand Rapids v. Braudy, 105 Mich. 670, 64 N. W. 29, 32 L. R. A. 116, 55 Am. St. Rep. 472 (1895).

See, also, Inhabitants of Quincy v. Kennard, 151 Mass. 563, 24 N. E. 860, (1890).

lating such use except as authorized. Commonwealth v. Stodder, 2 Cush. 562, 48 Am. Dec. 679; Cambridge v. Munroe, 126 Mass. 496, 502; Commonwealth v. Plaisted, 148 Mass. 375, 383, 19 N. E. 224, 2 L. R. A. 142, 12 Am. St. Rep. 566. It is the Legislature alone that primarily can impose, or give authority to impose, conditions and exact forfeitures (Lantz v. Hightstown, ubi supra; Dillon, Mun. Corp. [3d Ed.] § 345, note 4, and cases cited); and the authority of the board as a governmental agent is commensurate with the provisions of the statute clothing it with this power (Abbott v. Frost, 185 Mass. 398, 400, 70 N. E. 478).

A licensee should not be subjected to the uncertainties that constantly would arise if unauthorized limitations, of which he can have no knowledge, are subsequently and without notice to be read into his license at the pleasure of the licensing board. Besides, all reasonable police regulations, enacted for the preservation of the public health or morality, where a penalty is provided for their violation, while they may limit or prevent the use or enjoyment of property except under certain restrictions, and are constitutional, create statutory misdemeanors, which are not to be extended by implication. Commonwealth v. Beck, 187 Mass. 15, 72 N. E. 357.

The license issued to the defendant contained no limit of time for its exercise, nor was it made subject to an existing regulation which so provided. It stated that permission was given to keep eight horses, and purported to and did set out in full the statute under which it was granted, but contained no further recitals. Thus neither by its terms nor by the statute itself was it made revocable, nor does it appear that any regulations had been adopted or promulgated the violation of which would cause a forfeiture. Originally it may have been improvidently issued, but upon being informed that citizens in the vicinity of the defendant's premises objected to the erection of the building for its proposed use, it was not within the power of the board of health, even after a hearing, in the absence of authority conferred upon them by legislative sanction, to deprive him of the privilege they had unreservedly granted. Commonwealth v. Moylan, 119 Mass. 109, 111; Commonwealth v. Kinsley, ubi supra; Mayor v. Third Avenue Railroad, 33 N. Y. 42; Shuman v. Fort Wayne, 127 Ind. 109, 26 N. E. 560, 11 L. R. A. 378; Hirn v. State, ubi supra; Grand Rapids v. Braudy, ubi supra; Lantz v. Hightstown, ubi supra.

In the opinion of a majority of the court, the decree must be reversed, and a decree entered dismissing the bill, with costs. So ordered.[23]

[23] See Lantz v. Hightstown, 46 N. J. Law, 102, 108 (1884): "I can find no instance in the practice of boards of excise or other licensing bodies in which the power of revocation has been exerted except under the provisions of a statute." See, as to cancellation of license illegally obtained, State ex rel. Schaefer v. Schroff, 123 Wis. 98, 100 N. W. 1030, post, p. 490 (1904).

See, also, Thompson v. Gibbs, 97 Tenn. 489, 37 S. W. 277, 34 L. R. A. 548 (1896).

METROPOLITAN MILK & CREAM CO. v. CITY OF NEW YORK et al.

(Supreme Court of New York, Appellate Division, First Department, 1906. 113 App. Div. 377, 98 N. Y. Supp. 894.)

Appeal from Special Term, New York County.

Action by the Metropolitan Milk & Cream Company against the City of New York and another. From an interlocutory judgment overruling a demurrer to a separate defense in the answer, plaintiff appeals. Affirmed.

Argued before O'Brien, P. J., and Patterson, Ingraham, Laughlin, and Clarke, JJ.

Ingraham, J. The action was brought to recover $30,000 damages sustained by the plaintiff by the revocation by the board of health of the city of New York of certain permits issued by the said board under which the plaintiff was authorized to sell fresh and condensed milk in the city of New York. The plaintiff was a domestic corporation and engaged in selling milk and cream in the city of New York. The complaint alleges: That the department of health is a department of the city of New York, organized under the charter of the city of New York (chapter 466, p. 1, of the Laws of 1901). That prior to January 1, 1897, the board of health of the former city of New York issued to the plaintiff seven permits or licenses to sell milk in the city of New York, dated May 10, 1896. That thereafter the present board of health organized under the charter of 1901 issued to the plaintiff three additional permits to sell milk in the city of New York, dated May 7, 1902, and June 10, 1903. That the sale of milk by the plaintiff in the city of New York without a permit from the board of health was after the 14th of December, 1904, a misdemeanor. That on the 14th day of December, 1904, the board of health adopted a resolution wherein and whereby they directed all said 10 permits or licenses to sell milk theretofore issued to the plaintiff and under which the plaintiff was carrying on its said business to be forthwith annulled and revoked. That the action of the board was unjust, arbitrary, unlawful, and illegal, and without just cause, and that the said board was without any power, authority, or warrant in law to revoke said licenses. The form of the permits was set forth in the complaint as follows: "Metropolitan Milk & Cream Company is hereby authorized to sell milk, fresh and condensed, at borough of Manhattan, under the laws, rules, and regulations of the board of health, of the department of health of the city of New York. This permit is not transferable to any person or location other than above, and must be kept posted at all times in a conspicuous place in the store, and is revocable at the pleasure of the board." That the plaintiff's good will, trade, and business were at the time of said revocation of the value of $30,000. That in consequence of said revocation of the said licenses

or permits the plaintiff was prevented from continuing or carrying on its said business, and said business thereby and thereupon was forthwith wholly and instantly terminated and entirely destroyed, all to the plaintiff's damage in the sum of $30,000.

The defendants served separate answers, which set up as a separate defense that by virtue of the laws of the state of New York and the Sanitary Code of the city of New York the defendant, the department of health of the city of New York, had authority and power to prevent the plaintiff from bringing into the city of New York, or keeping or selling therein, unwholesome or adulterated milk, or milk which had been watered, or milk which had been in any respect adulterated, reduced, or changed by the addition of water or any other substance; that prior to the 14th day of December, 1904, the department of health of the city of New York, upon investigation and inquiry, discovered that the plaintiff was operating a creamery in the county of Orange, in the state of New York, which creamery and appurtenances were kept and maintained by the plaintiff in a filthy, unwholesome, and unsanitary condition, and from the said creamery the plaintiff was shipping and sending to the city of New York, to be sold to its citizens, milk which had been watered, and which had been adulterated and changed by different substances; and that the plaintiff had been using in such milk preservatives, so called, and coloring matter, and was also shipping and sending to New York, to be used by its citizens skim milk mixed with water, labelled "Butter Milk"; whereupon the department of health of the city of New York, after notice to the plaintiff and after a hearing upon all the facts, revoked the license or licenses of the plaintiff to sell milk in the city of New York, as it had a right to do, and as it was its duty to do, and not otherwise. To these separate defenses demurrers were interposed by the plaintiff, which were overruled.

The learned counsel for the defendants do not attack the sufficiency of the complaint, although it is somewhat difficult to see how any act of the board of health, acting under an authority conferred by the state to regulate the sale of impure and unwholesome milk in the city of New York, can impose an obligation upon the municipality. As this point, however, is not taken by the defendant, it will not be considered.

The first seven permits were issued on March 10, 1896, under the consolidation act (chapter 410, p. 1, Laws 1882, as amended). By section 34 (page 8) of that act the board of health was created a department of the said city. Section 575 (page 158) provides that the Sanitary Code "adopted and declared as such at a meeting of the board of health of the health department of the city of New York, held in the city, on the second day of June, 1873, as amended in accordance with law, is hereby declared to be binding and in force in said city." Section 576 (page 159) provides that the board of health "shall cause to be enforced the provisions of its Sanitary Code." In People ex rel.

Lieberman v. Vandecarr, 175 N. Y. 440, 67 N. E. 913, 108 Am. St. Rep. 781, it was held that section 66 of the Sanitary Code which reads, "No milk shall be received, held, kept, offered for sale or delivered in the city of New York without a permit in writing from the board of health and subject to the conditions thereof" was valid; that it was lawful for the health authorities in the city of New York to require the relator to obtain a permit under section 66 of the Sanitary Code in order to receive, hold, offer for sale and deliver milk, and failing so to do to arrest and punish him; that the vesting of powers more or less arbitrary in various officials and boards is necessary if the work of prevention and regulation is to ward off fevers, pestilence, and the many other ills that constantly menace great centres of population. The board of health thus having power to issue permits authorizing a person to carry on the business of dealing in milk in the city of New York, this power was continued by the subsequent charters of the city of New York.

By the present charter (chapter 466, p. 499, of the Laws of 1901) the board of health is constituted. Section 1172 of the charter, as amended by chapter 628, p. 1491, § 3, of the Laws of 1904, provides that: "The Sanitary Code which shall be in force in the city of New York on the first day of January, nineteen hundred and two, and all existing provisions of law fixing penalties for violations of said Code are hereby declared to be binding and in force in the city of New York, and shall continue to be so binding and in force, except as the same may, from time to time, be revised, altered, amended or annulled, as herein provided." By section 1169 it was made the duty of the board to "enforce all laws of this state applicable in said district, to the preservation of human life, or to the care, promotion or protection of health; and said board may exercise the authority given by said laws to enable it to discharge the duty hereby imposed; and this section is intended to include all laws relative to cleanliness, and to use or sale of poisonous, unwholesome, deleterious, or adulterated drugs, medicine or food. * * * The board of health shall use all reasonable means for ascertaining the existence and cause of disease or peril to life or health, and for averting the same, throughout the city." The board, being charged with the duty of protecting the health of the inhabitants and preventing the sale of impure or adulterated food, ascertained that the plaintiff, acting under the permits which it had issued, was engaged in selling impure and adulterated milk. The board gave to the plaintiff notice of these charges, and after a hearing it revoked the permits; and to sustain the contention of the plaintiff we must hold that such permit thereby becomes irrevocable and authorizes the person to whom it was granted to continue forever to sell milk, although the conditions under which the permit was issued were continually violated, the provisions of the Sanitary Code in relation to milk sold disregarded, and that a person acting under a permit from the board of health is selling to the inhal

itants of the city of New York poisonous and impure articles for food, endangering the public health.

The sole authority that the health board would have, if this contention was correct, would be to prosecute the person selling the poisonous article in the shape of milk, fine him, and in the meantime such person could go on poisoning the people under a permit or license from the health authorities, a proposition which is so unreasonable that a mere statement is sufficient to refute it. There is nothing in either the Penal Code or the charter that makes such a permit irrevocable. The permit itself provides that it is revocable at the pleasure of the board, and the plaintiff accepted it with that condition. There is nothing unreasonable in this condition; and, irrespective of the general power of the board of health to revoke a permit which is being abused and under which the person accepting it and using it is persistently violating the law, it is certainly not an unreasonable condition to insert into such a permit a provision that it is revocable by the board that issues it. To hold that a permit once granted is irrevocable would be to totally defeat the object of the statute in requiring such a permit before a person should engage in the business of supplying to the inhabitants of a city food. * * *[24]

SECTION 7.—ADMINISTRATIVE POWERS OF REGULATION—SCOPE AND VALIDITY

POTTS et al., School Directors, v. BREEN et al.

(Supreme Court of Illinois, 1897. 167 Ill. 67, 47 N. E. 81, 39 L. R. A. 152, 59 Am. St. Rep. 262.)

Suits by Jennie Breen and another, by Michael Breen, their father and next friend, against Lawrence W. Potts and others, School Directors of District No. 5, Township 2 N., Range 12 W., in Lawrence County, Ill. From a judgment of the Appellate Court (60 Ill. App. 201) affirming a judgment for plaintiffs, defendants appeal. Affirmed.

CARTER, J. These are two suits between the same parties, one a petition for a writ of mandamus to compel appellants to admit appellees to the public school of their district, and the other an action of trespass to recover damages for the exclusion of appellees from such

[24] A portion of the opinion is omitted.

This decision was referred to with approval in People ex rel. Lodes v. Department of Health, 189 N. Y. 187, 82 N. E. 187, 13 L. R. A. (N. S.) 894 (1907). It was affirmed by the Court of Appeals, without opinion, 186 N. Y. 533, 78 N. E. 1107.

school. The cases were tried together upon the following facts agreed upon, viz.:

Jennie Breen and Jim Breen, appellees, were the children of Michael Breen, a resident and taxpayer of district No. 5, township 2, range 12, Lawrence county, Ill., of which district the appellants were directors. These directors, acting under a certain rule and order of the state board of health, made a general order, applicable to all schools in their district, requiring that all pupils should be vaccinated before being admitted to such schools. They also employed a physician to vaccinate the pupils, and instructed and ordered the teacher of the school in question to impart no instruction to appellees until they should comply with said order; and appellees were refused admission to the school on the sole ground that they had failed and refused to comply with such order, the father of appellees absolutely refusing to permit his children to be vaccinated. The directors acted in good faith, under the belief that they were performing a duty imposed upon them by law, and used no direct force upon appellees, but simply denied them admission to the school, after repeated refusals to obey the orders relating to vaccination.

In their answer to the petition, the directors alleged that the state board of health made and promulgated the following order: "Resolved, that, by the authority vested in this board, it is hereby ordered that on and after January 1, 1882, no pupil shall be admitted to any public school in the state without presenting satisfactory evidence of proper and successful vaccination;" and that at the January meeting, 1894, the said state board of health passed the following resolution: "Resolved, that the power of the state board of health, under the law creating said board of health, to order the vaccination of all school children, is clear and unquestionable. The consequent duty of the board of school directors to see that such order is strictly enforced in their respective districts is equally clear, and the said order of the board of health is their sufficient authority for so doing." These orders of the state board of health were sent to the superintendent of schools of said Lawrence county, and were by him transmitted to the appellants, with written directions of the state board of health to enforce the same; and appellants made an order that all children attending the said school in their district should be vaccinated, or should show a physician's certificate of previous vaccination, as a condition of attendance upon the said school.

The trial court rendered judgment against appellants, granting the peremptory writ of mandamus as prayed, and assessed appellees' damages in the trespass case at one cent. These judgments have been affirmed, on appeal, by the Appellate Court, and appellants have prosecuted this appeal to this court. So far as the record discloses, appellees had not been exposed to infection by smallpox, but were in perfect health, and there was no reason for their exclusion except that

they had not been vaccinated. There was no epidemic of smallpox prevailing or apprehended in the vicinity of the school.

The record presents the question whether or not the state board of health, or the appellants, as such school directors, acting under its orders or otherwise, had any power to impose, as a condition of the admission of appellees to the public schools, the requirement of vaccination; and, further, if such power existed, and could be enforced as a police regulation, for the preservation of the public health, and to prevent the spread of contagious and infectious diseases, was the regulation and its enforcement, under the facts appearing in the record, a reasonable one?

Section 2 of the act creating the board of health (Laws 1877, p. 208) is as follows: "The state board of health shall have the general supervision of the interests of the health and life of the citizens of the state. They shall have charge of all matters pertaining to quarantine, and shall have authority to make such rules and regulations, and such sanitary investigations, as they may from time to time deem necessary for the preservation or improvement of public health; and it shall be the duty of all police officers, sheriffs, constables, and all other officers and employees of the state to enforce such rules and regulations, so far as the efficiency and success of the board may depend upon their official co-operation." Section 3 provides that the board of health shall have supervision over the state system of registration of births and deaths, as hereinafter provided: "They shall make up such forms and recommend such legislation as shall be deemed necessary for the thorough registration of vital and mortuary statistics throughout the state. The secretary of the board shall be superintendent of such registration." Section 4 makes it the duty of all physicians and accouchers to report to the county clerk "all births and deaths which may come under their supervision, with a certificate of the cause of death, and such correlative facts as the board may require in the blank forms furnished as hereinafter provided." Section 8 requires county clerks to render complete reports of all births, marriages, and deaths to the state board of health; and section 9 requires the board of health to prepare the necessary forms. Section 12 provides for an annual report by the board to the Governor, "and such report shall include so much of the proceedings of the board, and such information concerning vital statistics, and knowledge respecting diseases, and such instruction on the subject of hygiene, as may be thought useful by the board for dissemination among the people, with such suggestions as to legislative action as they may deem necessary."

By reference also to the act of the General Assembly to regulate the practice of medicine in this state, which was passed at the same session of the Legislature, and which makes reference to the state board of health, and provides for the examination and licensing by said board of persons desiring to practice medicine, it clearly appears that one of the most important duties of the board was to ascertain and certify

to the qualifications of practicing physicians and surgeons, and to detect quacks, and to prevent them and all ignorant pretenders from imposing upon the sick and helpless.

It is clear that no such power as claimed by the state board of health has been conferred upon it, unless by the broad and general language of the first section of the act creating it. But the general terms there employed must be construed in relation to the more specific duties imposed and powers conferred by the act taken as a whole, and, when thus construed, these general terms are restricted so as to express the true intent and meaning of the Legislature. Take, for example, the first sentence, viz.: "The state board of health shall have the general supervision of the interests of the health and life of the citizens of the state." The scope of the language there employed is practically unlimited, and were it not held to be restricted by well-known legal principles, applicable in the interpretation and construction of statutes, it would appear to confer more power on this board than the Legislature itself possessed. Plainly, it was not intended that any general supervisory power over the health and lives of citizens of the state should be exercised by the board otherwise than in conformity to law, and such as should be necessary, within reasonable limitations, in the performance of the administrative duties which were or should be imposed upon the board by statute. It had and could have no legislative power. Its duties were purely ministerial, and the provision of the statute authorizing the board to make such rules and regulations as it should from time to time deem necessary for the preservation or improvement of the public health cannot be held to confer that broad discretionary power contended for, to prescribe conditions upon which the citizen of the state may exercise rights and privileges guaranteed to him by public law.

In Huesing v. City of Rock Island, 128 Ill. 465, 21 N. E. 558, 15 Am. St. Rep. 129, it was contended that the city had the power, under clause 78, § 1, art. 5, of the city incorporation act, to construct and maintain a city abattoir, as a sanitary measure. This clause is as follows: "To do all acts, make all regulations, which may be necessary or expedient for the promotion of health or the suppression of disease." This court, however, held that, in view of the fact that the same section contained other provisions authorizing the city council to do certain specified acts for the preservation of the health of the city and the suppression of disease, the general provision did not enlarge the powers conferred by the special provisions.

As recently held by the Supreme Court of Wisconsin in a similar case, we are of the opinion that the powers of the board are limited to the proper enforcement of statutes, or provisions thereof, having reference to emergencies requiring action on the part of the agencies of government to preserve the public health, and to prevent the spread of contagious or infectious diseases. It will be observed that after the first section the powers and duties of the board with reference to dif-

ferent subjects are minutely specified, and it is required "to make reports to the Governor, and to include therein such information concerning vital statistics, and such knowledge respecting diseases, and such instruction on the subject of hygiene as may be thought useful by the board for dissemination among the people with such suggestions as to legislative action as they may deem necessary." Its duty to recommend legislation is repeated more than once in the act, in connection with specifications of the powers and duties of the board; and from no point of view can we regard it as having been within the legislative intent to confer, by the first section, plenary powers upon the board in all matters pertaining to the public health, without regard to other provisions of the statute, or further action by the Legislature.

Section 1 of article 8 of the Constitution provides that "the General Assembly shall provide a thorough and efficient system of free schools, whereby all children of this state may receive a good common school education." And the statute provides that the directors "shall establish and keep in operation for at least one hundred and ten days of actual teaching in each year * * * a sufficient number of free schools for the accommodation of all children in the district over the age of six and under twenty-one years, and shall secure to all such children the right and opportunity to an equal education in such schools." And the statute further provides that they shall adopt and enforce all rules and regulations for the management and government of the schools, and may suspend or expel pupils who may be guilty of gross disobedience or misconduct. The statute also contains provisions of similar import relating to schools in more populous districts and cities. It is therefore seen that the right or privilege of attending the public schools is given by law to every child of proper age in the state, and there is nowhere to be found any provision of law prescribing vaccination as a condition precedent to the exercise of this right.

Whether the Legislature has the power to make such a requirement or not, it is not necessary here to consider; it is sufficient that it has not done so, and it cannot be supposed that the Legislature has undertaken, and not expressly, but by mere implication from the general language used in creating the state board, to confer upon that mere administrative body such vast power over the rights and liberties of the individual citizen as to deprive him of his constitutional and statutory rights, unless he shall submit his body to be inoculated with vaccine virus, as a mere precaution against some possible future contagion of smallpox. It is doubtless true that in a large number of school districts in interior parts of the state no case of smallpox has ever existed in the history of the state, and yet, by this order of the board, no citizen who has children to educate, although compelled by law to pay taxes to support the public schools, can send his children to such schools without first having such child vaccinated, as a precau-

tion against a disease which had never appeared, and where there was no apparent danger that it would ever appear in the vicinity.

The power to compel vaccination, or to require it as a condition precedent to the exercise of some right or privilege guaranteed to the citizen by public law, can be derived from no other source than the general police power of the state, and can be justified upon no other ground than as a necessary means of preserving the public health. Without the necessity, or reasonable grounds upon which to conclude that such necessity exists, the power does not exist. As such the board of health has no more power over the public schools than over private schools or other public assemblages, and its order applying to public schools only, requiring vaccination as a prerequisite to the exercise of the right to attend a public school could be justified only upon reasonable grounds appearing that the contagion of smallpox would more likely originate in or be disseminated from the public schools than from other assemblages. Whether it might be invested with power in this respect is a question not involved here, and not necessary to consider.

While school directors and boards of education are invested with power to establish, provide for, govern, and regulate public schools, they are in these respects nowise subject to the direction or control of the state board of health, and, as before pointed out, they have no authority to exclude children from the public schools on the ground that they refuse to be vaccinated, unless, indeed, in cases of emergency, in the exercise of the police power, it is necessary, or reasonably appears to be necessary, to prevent the contagion of smallpox. Undoubtedly, also children infected or exposed to smallpox may be temporarily excluded, or the school may be temporarily suspended; but, like the exercise of similar power in other cases, it is justified by the emergency, and, like the necessity which gives rise to it, ceases when the necessity ceases.

No one would contend that a child could be permanently excluded from a public school because it had been exposed to smallpox, or that the school could be permanently closed, because of the remote fear that the disease of smallpox might appear in the neighborhood, and that, if the school should then be open and children in attendance upon it, the public would be exposed to the contagion. And, upon the same line of reasoning, without a law making vaccination compulsory, or prescribing it, upon grounds deemed sufficient by the Legislature as necessary to the public health, as a condition of admission to or attendance upon the public schools, neither the state board nor any local board has any power to make or enforce a rule or order having the force of a general law in the respects mentioned.

We are not called upon to consider whether or not vaccination is a preventative, or the best known preventative, of smallpox. That it is so seems to be the consensus of opinion of a learned and honorable profession, borne out by the history of its use for a century, and we

can only so regard it; but, when compulsorily applied, it must, like all other civil regulations, be applied in conformity to law. However fully satisfied, by learning and experience, a board might be that antitoxine would prevent the spread of diphtheria, no one would contend that a rule enforcing its use as a condition precedent to the admission of a child to the public schools would, as the law now is, be valid. It is a matter of common knowledge that the number of those who seriously object to vaccination is by no means small, and they cannot, except when necessary for the public health and in conformity to law, be deprived of their right to protect themselves and those under their control from an invasion of their liberties by a practically compulsory inoculation of their bodies with a virus of any description, however meritorious it might be.

The same conclusion was reached by the Supreme Court of Wisconsin in State v. Burdge, 95 Wis. 390, 70 N. W. 347, 37 L. R. A. 157, 60 Am. St. Rep. 123, in a case similar in all respects to this. In that case the court also, upon the question of the power of the Legislature to delegate to such board the power to make a rule having the force of a general law, cited Dowling v. Insurance Co., 92 Wis. 63, 65 N. W. 738, 31 L. R. A. 112, which held that the Legislature could not delegate the insurance commissioner the power, essentially legislative, to prepare, approve, and adopt a form of "a standing fire insurance policy" for use in that state, and which use was to be enforced by penal sanction of the act. See, also, on this subject, O'Neil v. Insurance Co., 166 Pa. 72, 30 Atl. 945, and Anderson v. Assurance Co., 59 Minn. 182, 63 N. W. 241, 28 L. R. A. 609, 50 Am. St. Rep. 400. See, also, Tugman v. City of Chicago, 78 Ill. 405.

As said in State v. Young, 29 Minn. 474, 9 N. W. 737: "It is a principle not questioned that, except where authorized by the Constitution, as in respect to municipalities, the Legislature cannot delegate legislative power—cannot confer on any body or person the power to determine what shall be law. The Legislature only must determine this."

Hurst v. Warner, 102 Mich. 238, 60 N. W. 440, 26 L. R. A. 484, 47 Am. St. Rep. 525, construed an act of the Michigan Legislature which provided that, in certain contingencies specified in the act, the state board of health should be authorized to establish a quarantine, and to make rules for the disinfection of baggage belonging to persons coming from a country where contagious disease exists, and, through an inspector acting thereunder, to detain for disinfection baggage of passengers, passing through the state, and coming from localities where a dangerous, communicable disease exists. It was held by the court that the act did not authorize a rule subjecting the baggage of all immigrants to disinfection, whether such immigrant came from a part or locality where any dangerous, communicable disease existed or not.

The case of Abeel v. Clark, 84 Cal. 226, 24 Pac. 383, was a manda-

mus proceeding to compel the principal of a public school to admit Abeel as a scholar, who had been refused admission because he had not complied with the vaccination act. This act provided that the school trustees and board shall "exclude from the benefits of the common schools any child or any person who has not been vaccinated." The act was held constitutional. The court says: "Vaccination, then, being the most effective method known of preventing the spread of the disease referred to (smallpox), it was for the Legislature to determine whether the scholars of the public schools should be subjected to it."

The case of Duffield v. School Dist., 162 Pa. 476, 29 Atl. 742, 25 L. R. A. 152, was a mandamus proceeding to compel the admission of the plaintiff's minor child into the common schools of Williamsport. The facts in this case were that there was an ordinance of the city of Williamsport in force providing that no pupil "shall be permitted to attend any public or private school in said city without a certificate of a practicing physician that such pupil has been subjected to the process of vaccination"; that smallpox was then existing in Williamsport, and had been epidemic in many near-by cities and towns; that the board of health and the school board, in view of the general alarm prevailing in the city over the report that a case of smallpox was in the city, had adopted a resolution in conformity with said city ordinance. The questions raised related to the power of the school board to adopt reasonable health regulations, and to the reasonableness of the particular regulation complained of, and the action of the board was sustained. But the case was unlike the one at bar in the fact that smallpox was then in the city, and was prevalent in adjoining communities. A similar conclusion was reached in Bissell v. Davison, 65 Conn. 183, 32 Atl. 348, 29 L. R. A. 251, but the general statute of Connecticut had expressly conferred upon the school committee the power exercised by it.

The cases of In re Walters, 84 Hun, 457, 32 N. Y. Supp. 322, and Abeel v. Clark, 84 Cal. 226, 24 Pac. 383, involved the constitutionality of statutes requiring all children to be vaccinated before being admitted to the public schools, and such statutes were held to be constitutional. That question is not involved here, and the reasoning employed in those cases does not apply where this legislative power is exercised by an administrative board, and not by the Legislature itself. Nor can the rule in question be regarded as a reasonable one where, as in this case, smallpox did not exist in the community, and where there was no cause to apprehend that it was approaching the vicinity of the school, or likely to become prevalent there. The record wholly fails to show that there were any grounds upon which the board could have any reasonable belief that the public health was in any danger whatever.

Neither the board of health nor the board of directors having any power to make and enforce the order in question under the facts of

this case, it follows that appellees were unlawfully excluded from the school.

The powers of school officers under the statute have been considered by this court in numerous cases. Rulison v. Post, 79 Ill. 567; Trustees of Schools v. People, 87 Ill. 303, 29 Am. Rep. 55; McCormick v. Burt, 95 Ill. 263, 35 Am. Rep. 163, Chase v. Stephenson, 71 Ill. 383; People v. Board of Education, 101 Ill. 308, 40 Am. Rep. 196; and other cases. But nothing said in any of those cases sustains the contention of appellants.

The judgment of the Appellate Court affirming the judgment of the circuit court is affirmed. Judgment affirmed.[25]

ARMS v. AYER.

(Supreme Court of Illinois, 1901. 192 Ill. 601, 61 N. E. 851, 58 L. R. A. 277, 85 Am. St. Rep. 357.)

Action by Aura C. Arms against Frederick Ayer and others. From a judgment in defendants' favor, plaintiff appeals. Reversed.

The appellant sued appellees in the superior court of Cook county, in case, to recover damages for unlawfully causing the death of her intestate. The declaration is very voluminous, consisting of 10 counts, to each of which the defendants interposed a general and special demurrer. The circuit court sustained the demurrer, and gave judgment for the defendants. This appeal is from that judgment.

The cause of action in each count of the declaration is based upon an alleged violation of the fire-escape act, approved May 27, 1897

[25] "Neither the holding of the Supreme Court of Illinois nor that of the Wisconsin Supreme Court in the cases mentioned [Potts v. Breen, 167 Ill. 67, 47 N. E. 81, 39 L. R. A. 152, 59 Am. St. Rep. 262 (1897); State ex rel. Adams v. Burdge, 95 Wis. 390, 70 N. W. 347, 37 L. R. A. 157, 60 Am. St. Rep. 123 (1897)] can, under the facts be said to militate against the conclusion which we reach in the case at bar. In fact, there is much asserted in both cases which may be said to be in harmony with our holding herein. We are not called upon, however, to decide whether a rule of either the state board or local board of health can be carried beyond the limits of the facts of this case. Appellant contends that, under the order of the local board, his son was to be permanently expelled from the public schools of the city of Terre Haute unless he submitted to vaccination. No such unreasonable interpretation can be placed upon the rule or order in question. The order was the offspring, as we have seen, of an emergency arising from a reasonable apprehension upon the board's part that smallpox would become epidemic or prevalent in the city of Terre Haute. The rule or order could not be considered as having any force or effect beyond the existence of that emergency; and Kleo Blue, by virtue of its operation, could only be excluded from school upon his refusal to be vaccinated, until after the danger of an epidemic of smallpox had disappeared. Any other construction than this would render the rule or order absurd, and place the board in the attitude of attempting to usurp authority. Such an interpretation is not authorized when a more reasonable one can be supplied." Blue v. Beach, 155 Ind. 121, 140, 56 N. E. 89, 50 L. R. A. 64, 80 Am. St. Rep. 195 (1900).

(Laws 1897, p. 222), and the general demurrer goes to the validity of the act. It is as follows:

"Section 1. That within three (3) months next after the passage of this act all buildings in this state which are four or more stories in height, excepting such as are used for private residences exclusively, but including flats and apartment buildings, shall be provided with one or more metallic ladder or stair fire-escapes attached to the outer walls thereof, and provided with platforms of such form and dimensions, and such proximity to one or more windows of each story above the first, as to render access to such ladder or stairs from each such story easy and safe, and shall also be provided with one or more automatic metallic fire-escapes, or other proper device, to be attached to the inside of said buildings so as to afford an effective means of escape to all occupants who, for any reason, are unable to use said ladders or stairs; the number, location, material and construction of such escapes to be subject to the approval of the inspector of factories: provided, however, that all buildings more than two stories in height, used for manufacturing purposes, or for hotels, dormitories, schools, seminaries, hospitals, or asylums, shall have at least one such ladder fire-escape for every fifty (50) persons, and one such automatic metallic escape, or other device, for every twenty-five (25) persons, for which working, sleeping or living accommodations are provided above the second stories of said buildings; and that all public halls which provide seating room above the first or ground story shall be provided with such numbers of said ladder and other fire-escapes as said inspector of factories shall designate.

"Sec. 2. All buildings of the number of stories and used for the purposes set forth in section 1 of this act which shall be hereafter erected within this state shall, upon or before their completion, each be provided with fire-escapes of the kind and number and in the manner set forth in this act.

"Sec. 3. It shall be the duty of said inspector of factories to serve a written notice, in behalf of the people of the state of Illinois, upon the owner or owners, trustees or lessees, or occupant, of any building within this state not provided with fire-escapes in accordance with the requirements of this act, commanding such owner, trustee, lessee or occupant, or either of them, to place or cause to be placed upon such building such fire-escape or escapes as provided in section 1 of this act, within thirty (30) days after the service of such notice. * * *

"Sec. 4. Any such owner or owners, trustee, lessee, or occupant, or either of them, so served with notice as aforesaid, who shall not, within thirty (30) days after the service of such notice upon him or them, place or cause to be placed such fire-escape or escapes upon such building as required by this act and the terms of such notice, shall be subject to a fine of not less than $25 or more than $200, and to a further fine of $50 for each additional week of neglect to comply with such notice.

"Sec. 5. The erection and construction of any and all fire-escapes provided for in this act shall be under the direct supervision and control of said inspector of factories, and it shall be unlawful for any person or persons, firm or corporation to erect or construct any fire-escape or escapes, except in accordance with a written permit first had and obtained and signed by said inspector of factories, which permit shall prescribe the number, location, material, kind and manner of construction of such fire-escape.

"Sec. 6. Any person or persons, firm or corporation, who shall be required to place one or more fire-escapes upon any building or buildings, under the provisions of this act, shall file in the office of said inspector of factories a written application for a permit to erect or construct such fire-escape or escapes, which application shall briefly describe the character of such building or buildings, the height and number of stories thereof, the number of fire-escapes proposed to be placed thereon, the purposes for which such building or buildings is or are used, and the greatest number of people who use or occupy or are employed in such building or buildings above the second stories thereof at any one time." * * *

WILKIN, C. J.[26] (after stating the facts). The argument in this case is mainly upon the constitutionality and validity of the act of 1897, and we shall confine our consideration of the case to that question. We see no substantial objection to at least some of the counts on the special demurrer.

The first objection made to the statute by counsel for appellees is that it imposes legislative power upon the inspector of factories, in that it authorizes him to determine how many, and in what position, fire-escapes shall be placed, etc. It must be admitted that the act is loosely drawn, but the rule that it is the duty of courts to so construe statutes as to uphold their constitutionality and validity, if it can be reasonably done, is so well established that the citation of authorities is needless. In other words, if the proper construction of a statute is doubtful, courts must resolve the doubt in favor of the validity of the law. Statutes and city ordinances providing for fire-escapes are usually somewhat general in their enactments, and necessarily so, for the reason that it is impossible for the Legislature to describe in detail how many fire-escapes shall be provided, how they shall be constructed, and where they shall be located, in order to serve the purpose of protecting the lives of occupants, in view of the varied location, construction, and surroundings of buildings; and hence, so far as we have been able to ascertain, acts similar to the first section of this statute have been sustained in other states, though perhaps the question here raised has never been directly presented. Rose v. King, 49 Ohio St. 213, 30 N. E. 267, 15 L. R. A. 160; Willy v. Mulledy, 78 N. Y. 310, 34 Am. Rep. 536; Pauley v. Lantern Co., 131 N. Y. 90, 29 N. E. 999, 15 L. R. A. 194; Schott v. Harvey, 105 Pa. 222, 51 Am. Rep. 201; City of

[26] Portions of this case are omitted.

Cincinnati v. Steinkamp, 54 Ohio St. 284, 43 N. E. 490; Sewell v. Moore, 166 Pa. 570, 31 Atl. 370; Keely v. O'Conner, 106 Pa. 321; In re Fire-Escapes, 2 Pa. Dist. R. 623.

The general rule is that a statute must be complete when it leaves the Legislature—as to what the law is—leaving its execution to be vested in third parties. Thus it was said in Dowling v. Insurance Co., 92 Wis. 63, 65 N. W. 738, 31 L. R. A. 112: "The result of all the cases on this subject is that a law must be complete in all its terms and provisions when it leaves the legislative branch of the government, and nothing must be left to the judgment of the electors, or other appointee or delegate of the Legislature, so that in form and substance it is a law in all its details in præsenti, but which may be left to take effect in futuro, if necessary, upon the ascertainment of any prescribed fact or event." And it is said in Suth. St. Const. § 68: "The true distinction is between a delegation of power to make the law, which involves a discretion as to what the law shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done. To the latter no objection can be made."

In People v. Reynolds, 5 Gilman, 1, it was held that to establish the principle that, whatever the Legislature may do, it shall do in every detail, or else it shall go undone, would be almost to destroy the government. It is there said (page 13): "Necessarily, regarding many things, especially affecting local or individual interests, the Legislature may act either mediately or immediately. We see, then, that, while the Legislature may not devest itself of its proper functions or delegate its general legislative authority, it may still authorize others to do those things which it might properly, yet cannot understandingly or advantageously, do itself. Without this power, legislation would become oppressive and yet imbecile."

In this act the law is complete in all its details, requiring the fire-escapes to be put in certain buildings. The outside escapes must be so constructed as to render access to the same from each story easy and safe. Though meaningless in so far as it speaks of "automatic metallic fire-escapes," it does require a proper device to be attached to the inside of the described buildings, so as to afford an effective means of escape to all occupants who for any reason are unable to use the ladders or stairs. In the execution of the law the inspector of factories is given a discretion as to the number, location, material, and construction of such escapes in each and every building. We are unable to see in what way the act, thus understood and construed, delegates to the inspector of factories legislative power.

Of still less force is the objection that the act confers judicial power upon the inspector of factories. The inspector is given no power to judicially determine any question, but acts ministerially in the supervision of the building of fire-escapes. Judicial power is "the power which adjudicates upon and protects the rights and interests of in-

dividual citizens, and to that end construes and applies the law." The judicial power is never extended to cases of the exercise of judgment in the execution of a ministerial power. Land Owners v. People, 113 Ill. 296. * * *

It is said that, "even though it is assumed that the law is capable of enforcement, no one can be held liable for the nonperformance therewith until the inspector of factories has served the notice required by the act." With this contention we cannot agree. It is true, the first and second sections do not say who shall provide the required fire-escape, but we think the fair and reasonable intendment is that the owner or owners shall perform the duty; and we so held in construing the fire-escape act of 1885 (Laws 1885, p. 201), the provisions of which in this regard are the same as the act under consideration, in the recent case of Landgraf v. Kuh, 188 Ill. 484, 59 N. E. 501. The language of section 6, "who shall be required to place one or more fire-escapes upon any building or buildings, under the provisions of this act," does not mean who shall be required by the inspector of factories, but who shall be required by the act. The duty to provide fire-escapes upon buildings described in section 1 does not depend upon the performance of any duty by the inspector of factories.

In McRickard v. Flint, 114 N. Y. 222, 21 N. E. 153, the language of the act under which the suit was brought was, "in any store or building in the city of New York in which there shall exist or be placed any hoisting elevator or well-hole, the openings thereof through and upon each floor of such buildings shall be provided with and protected by a substantial railing, and such good and sufficient trap-doors with which to enclose the same, as may be directed and approved by the superintendent of buildings"; and it was held: "The exercise of the duty imposed upon the defendants by this statute was not dependent upon any action of the superintendent of buildings. They could not properly delay for him to direct, but it was for them to call on him for directions and approval in that respect."

In Willy v. Mulledy, supra, where the act provided "that every building in the city of Brooklyn should have a scuttle or place of egress in the roof thereof," etc., and also that certain houses "shall be provided with such fire-escapes and doors as shall be directed and approved by the commissioner" (of the department of fire and buildings), and also that "any person, after being notified by such commissioner, who shall neglect to place upon any such building the fire-escapes herein provided for, shall forfeit the sum of $500 and shall be guilty of a misdemeanor," it was held: "The owner of the building in question was bound to provide it with a fire-escape. He was not permitted to wait until he should be directed to provide one by the commissioners. He was bound to do it in such way as they should direct and approve, and it was for him to procure their direction and approval." And the court further says: "Here was, then, an absolute duty imposed upon a defendant by statute, to provide a fire-escape;

and the duty was imposed for the sole benefit of the tenants of the house, so that they would have a mode of escape in case of a fire. For the breach of this duty, causing damage, it cannot be doubted that the tenants have a remedy." To the same effect is Rose v. King, supra.

When the act went into effect it was the duty of every owner, trustee, or lessee or occupant in the actual control of any building within the description mentioned in the first section, in obedience to section 6, to file in the office of the inspector of factories a written application for a permit to erect or construct fire-escapes; and if these defendants failed to do so, as alleged in the several counts of the declaration, and injury resulted from their failure to place the required fire-escapes in the building described, they incurred a liability to the person injured, and cannot escape that liability merely because they may not have been designated by the inspector of factories as the persons upon whom the duty was imposed to comply with the law. In other words, the law imposed upon them the performance of the duty, and the action of the inspector of factories, the grand jury, the sheriff, and the circuit and criminal courts is only made necessary in case they failed to do that duty. It has been held that the term "owner," in similar statutes, does not mean the owner of the fee, but may mean the lessee in actual possession and control of the building, but we are not aware that any court has held such laws invalid because of their failure to definitely designate who should be liable. We think it clear that under this statute the owner is primarily liable for a failure to perform the duty. * * *

The judgment of the superior court will be reversed, and the cause will be remanded to that court for further proceedings not inconsistent with the views here expressed. Reversed and remanded.

SCHAEZLEIN et al. v. CABANISS, Judge.

(Supreme Court of California, 1902. 135 Cal. 466, 67 Pac. 755, 56 L. R. A. 733, 87 Am. St. Rep. 122.)

In Bank. Certiorari by Robert Schaezlein and others against George H. Cabaniss, Judge of the Police Court of the City and County of San Francisco, to review a judgment of the latter court convicting the relator of misdemeanor. Judgment reversed.

PER CURIAM. This is certiorari to the police court of the city and county of San Francisco. Petitioners were charged with violating the provisions of "an act to provide for the proper sanitary condition of factories," etc., approved February 6, 1889. That act declares as follows: "If in any factory or workshop any process or work is carried on by which dust, filaments or injurious gases are generated or produced that are liable to be inhaled by the persons employed therein,

and it appears to the commissioner of the bureau of labor statistics that such inhalation could, to a great extent, be prevented by the use of some mechanical contrivance, he shall direct that such contrivance shall be provided, and within a reasonable time it shall be so provided and used." Section 6 of the act makes it a misdemeanor for any person to violate any of the provisions of the act. St. 1889, p. 3.

Petitioners were convicted of having unlawfully refused and neglected, after notice, to provide and use a suction exhauster with properly attached pipes, hoods, etc., in a metal polishing shop, within a reasonable time after having been directed so to do. The ultimate question presented for consideration under this writ is that of the constitutionality of the act above quoted.

That the Legislature may not delegate its lawmaking functions, excepting to such agents and mandatories as are recognized by the Constitution, is, of course, beyond controversy. Equally we think beyond controversy, however, is the right of the state, in the exercise of its police power, to pass reasonable laws for the protection of the health of employés in given vocations, and to make the violation of those laws penal offenses. The limit to which the state may go in this direction is not as yet well defined, but the argument that any such legislation is an interference with the right of property—the free right of contract between employer and employé—has been disposed of and settled by the courts in numerous decisions.

Thus says the Supreme Court of the United States in Holden v. Hardy, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780: "The Legislature has also recognized the fact, which experience of legislators in many states has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employés, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules, and the laborers are practically constrained to obey them. In such a case self-interest is often an unsafe guide, and the Legislature may properly interpose its authority."

So we have upon the statute books numerous requirements looking to the safety, and even the welfare, of employés in different vocations. Protection against the inclemency of the weather for motormen, hand rails to stairs, inclosing hoist shafts, automatic doors to elevators, automatic shifters for throwing off belts and pulleys, fire escapes on buildings, water supplies in tenement houses, are examples of this class and kind of legislation, which have been pronounced valid by the courts.

In People v. Smith, 108 Mich. 527, 66 N. W. 382, 32 L. R. A. 853, 62 Am. St. Rep. 715, it is well said: "The trouble with these cases arises over the inability of the courts to fix a rigid rule by which the

validity of such laws may be tested. Each law of the kind involves the questions: (1) Is there a threatened danger? (2) Does the regulation invade a constitutional right? (3) Is the regulation reasonable?"

It is no longer in dispute that these laws may be and are upheld as proper exercise of the police powers when they affect, not the health of the community generally, but the health or welfare of operatives employed in any given vocation. The law is not to be condemned as special legislation because it does not affect all the people, provided it affects the welfare of a portion of the community, or of any indefinite number similarly situated. Therefore the power of the Legislature by general law to provide for the proper sanitation of factories, foundries, mills, and the like, does not call for discussion. It is no invasion of the right of the employer freely to contract with his employé to provide by general law that all employers shall furnish a reasonably safe place and reasonably wholesome surroundings for their employés.

The difficulty with the present law, however, is that it does not so provide, but that it is an attempt to confer upon a single person the right arbitrarily to determine, not only that the sanitary condition of a workshop or factory is not reasonably good, but to say whether, even if reasonably good, in his judgment its condition could be improved by the use of such appliances as he may designate, and then to make a penal offense of the failure to install such appliances. "The very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220.

Under the law here in question it matters not how unwholesome, how dangerous, how unsanitary the condition of any factory or workshop may be, the proprietor is guilty of no offense until the commissioner of the bureau of labor statistics has required him to use appliances which the commissioner himself shall designate, and he has refused so to do. Nor does it matter if the condition of such a workshop be reasonably wholesome for the uses of the operatives, if "dust, filaments, or injurious gases" are "liable to be inhaled" (and it is here the mere liability, and not the fact, of the inhalation which invites the action of the commissioner), and if, in the opinion of the commissioner, such liability to inhalation could "to a great extent" be prevented, he may designate and prescribe the kind of appliance which in his judgment is suitable for such purpose, and it must be employed.

But the judgment of the commissioner is not only the determinative factor in the proposition as to whether or not the condition of the factory may be improved "to a great extent," but under this law it is absolutely conclusive and binding upon the question of the appliances to be used; and thus it may result, as to three factories similarly situated,

which as to sanitation or the danger from inhalation are in precisely the same condition, that the proprietor of one may be guilty of no offense because he has not been notified by the commissioner to adopt any appliance, the proprietor of the second may be called upon to put into use some appliance at a trifling cost, while the proprietor of the third may have imposed upon him an expense for apparatus amounting to thousands of dollars. In short, arbitrarily, and within the declaration, not of the Legislature, but of the commissioner, no burden whatever may be imposed upon one institution, while the other, in obedience to this law, may be subjected to a most onerous and even destructive expense. The Legislature, as we have said, may require the owners of factories and workshops to put their buildings in proper condition as to sanitation, may require them to provide reasonable safeguards against danger for the operatives, but it may not leave the question as to whether and how these things shall be done or not done at the arbitrary disposition of any individual.

By respondent reliance is placed on the case of Taylor v. Hughes, 62 Cal. 38. In that case section 637 of the Penal Code was under review. It provides that every owner of a dam or other obstruction in any running water of this state, who after being ordered and notified by the fish commissioners to construct a fish ladder or to repair a fish ladder already constructed on such dam or other obstruction, according to the plans of the fish commissioners, fails to construct or repair such fish ladder within 30 days after such notice, is guilty of a misdemeanor. The application was for a writ of review in which was set forth the complaint, charging petitioner Taylor with a violation of this statute, and his conviction thereunder. The decision of this court, embraced in a single sentence, was to the effect that the application did not present grounds for the issuance of the writ. The distinction, however, between that case and the case at bar is broad. The running waters of the state of California are public property. One who obstructs them obstructs them under license or permission from the state, but only upon such conditions as to their use as the state may impose. It is therefore permissible for the state to impose such conditions upon that use as it may see fit, and in this case the requirement was that the person so obstructing the water should build an appliance to permit the free running of the fish up the stream. Here was no interference with private property; here was merely a condition imposed by the state upon a private individual as to his use of property, the title to which, and the right of fishery in which, remained in the public.

The same broad distinction exists between the case at bar and that of Health Department of City of New York v. Rector, etc., of Trinity Church, 145 N. Y. 32, 39 N. E. 833, 27 L. R. A. 710, 45 Am. St. Rep. 579, also relied upon by respondent. In the latter case, section 663 of the consolidation act of the city of New York required all tenement houses to be supplied with sufficient water on each floor, at one or more places, in sufficient quantity, by the owners, whenever they

were directed so to do by the board of health, making it a misdemeanor to fail to comply with the directions of the board. Here the only requirement was that a sufficient quantity of water should be supplied on each floor of the tenement building. To answer this law, it was necessary only to show that a sufficient quantity of water was supplied for the health and convenience of the tenants. The direction of the board of health, or its determination that the supply was insufficient, was not conclusive; for, as the court said in sustaining the validity of the law: "The citizen cannot under this act be punished in any way, nor can any penalty be recovered from him for an alleged noncompliance with any of its provisions or with any order of the board of health, without a trial. The punishment or penalty provided for in section 665 cannot be enforced without a trial under due process of law, and upon such trial he has an opportunity to show whatever facts would constitute a defense to the charge."

The manifest objection to this law is that upon the commissioner has been imposed, not the duty to enforce a law of the Legislature, but the power to make a law for the individual, and to enforce such rules of conduct as he may prescribe. It is thus arbitrary, special legislation, and violative of the Constitution.

For the foregoing reasons, the police court is directed to annul the proceedings touching the trial, conviction, and judgment against petitioner herein.[27]

[27] "The claim that the statute commits to the arbitrary discretion of the Secretary of the Treasury the determination of what teas may be imported, and therefore in effect vests that official with legislative power, is without merit. We are of opinion that the statute, when properly construed, as said by the Circuit Court of Appeals, but expresses the purpose to exclude the lowest grades of tea, whether demonstrably of inferior purity, or unfit for consumption, or presumably so because of their inferior quality. This, in effect, was the fixing of a primary standard, and devolved upon the Secretary of the Treasury the mere executive duty to effectuate the legislative policy declared in the statute. The case is within the principle of Marshall Field & Co. v. Clark, 143 U. S. 649, 12 Sup. Ct. Rep. 495, 36 L. Ed. 294, where it was decided that the third section of the tariff act of October 1, 1890 (26 Stat. 567, c. 1244), was not repugnant to the Constitution as conferring legislative and treaty-making power on the President, because it authorized him to suspend the provisions of the act relating to the free introduction of sugar, molasses, coffee, tea, and hides. We may say of the legislation in this case, as was said of the legislation considered in Marshall Field & Co. v. Clark, that it does not, in any real sense, invest administrative officials with the power of legislation. Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute. To deny the power of Congress to delegate such a duty would, in effect, amount but to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted." Buttfield v. Stranahan, 192 U. S. 470, 496, 24 Sup. Ct. 349, 48 L. Ed. 525 (1904).

CHAPTER II

ADMINISTRATIVE DISCRETION

SECTION 8.—CONSTRUCTION OF POWERS

JACOB (TOMLINS) LAW DICTIONARY, LONDON, 1809, v. DISCRETION.

Where anything is left to any person to be done according to his discretion, the law intends it must be done with a sound discretion and according to law; and the Court of King's Bench hath a power to redress things that are otherwise done notwithstanding they are left to the discretion of those that do them. 1 Lil. Abr. 477.

Discretion is to discern between right and wrong, and therefore whoever hath power to act at discretion is bound by the rule of reason and law. 2 Inst. 56, 298.

And though there be a latitude of discretion given to one, yet he is circumscribed that what he does be necessary and convenient, without which no liberty can defend it. Hob. 258.

STATE v. JUSTICES OF INFERIOR COURT OF MORGAN COUNTY.

(Supreme Court of Georgia, 1854. 15 Ga. 408.)

Lester Markland applied to the inferior court of Morgan county for an order for a license to retail spirituous liquors in that county, having paid for such license, and being ready to give the bond and security required. The court refused to grant the license, on the ground that the applicant was an unfit person to be so licensed—having been twice convicted of selling spirituous liquor to slaves, contrary to law.

On hearing this return to a mandamus nisi, Judge Hardeman refused to make the mandamus absolute. This decision is assigned as error.

STARNES, J.[1] * * * It is agreed that the first act on this subject, now of force in our state, was passed in 1791. This was entitled "An act for regulating taverns," etc. The first section provided that upon the petition of any person wishing to keep a tavern, or house

[1] Only a portion of the opinion is printed.

of entertainment, the justices of the inferior court, held for the county of such person's residence, shall "consider the convenience of such place intended for a tavern, and having regard to the ability of such petitioner to keep good and sufficient accommodations for travellers, their horses and attendants, may, at their discretion, grant a license," etc., provided that the applicant should enter into bond, with sufficient security, "conditioned for the keeping an orderly and decent house, with good and sufficient accommodation for travellers," etc. The second section required the rates of charges to be fixed by the court. The third provided a penalty for retailing without license. The fourth fixed the price to be paid for such license; and the fifth repealed conflicting acts, and gave to the corporations of Savannah and Augusta the right to regulate licenses in those cities. * * *

Let us remark, also, that the limits of the discretion, by this act conferred upon the inferior court, are: (1) A consideration of the convenience of the locality intended for a tavern. (2) The ability of the petitioner to supply such tavern with proper accommodation for travellers, their horses and attendants. And that no discretion, whatever, is given the inferior court, by which to grant or refuse the license, according as the character of the applicant may be good or bad.

The only provision which seems to have been contemplated, as a protection against the grant of such license, to a person of bad moral character, was the requirement of bond and security, for the keeping an orderly and decent house. * * *

Let the judgment be reversed.[2]

PEOPLE ex rel. SHEPPARD v. ILLINOIS STATE BOARD OF DENTAL EXAMINERS.

(Supreme Court of Illinois, 1884. 110 Ill. 180.)

This is an original proceeding in this court for a mandamus. The petition therefor is as follows:

"The petitioner, Isaac N. Sheppard, a citizen of the state of Illinois, residing in the city of Paris, county of Edgar, in said state, complaining, shows unto the court that he is twenty-one years of age; that he became a student at the Indiana Dental College, an institution duly organized under the laws of the state of Indiana, located at the city of Indianapolis, in said state, on the 3d day of October, 1881, said institution being a college for the purpose of educating persons in the theory and practice of dentistry and dental surgery; that he attended said college as a student, as aforesaid, during his two full terms thereof, and pursued a course of study in the theory and practice of dentistry and dental surgery during all that time at said college, and that he completed said course of study, and was graduated from said col-

[2] Compare State v. Hanlon, 24 Neb. 608, 612, 613, 39 N. W. 780 (1888).

lege on the 7th day of March, A. D. 1883, and thereupon, to wit, on the day last aforesaid, he received a diploma from the faculty of said Indiana Dental College, duly authenticated by the signatures of the faculty of said college and the officers thereof; that said Indiana Dental College is a reputable dental college, and during the time petitioner was a student therein, and at the time of issuing said diploma by the faculty of said dental college to petitioner, there was annually delivered at said college a full course of lectures and instruction in dental surgery. Petitioner further shows unto the court that desiring to engage in the practice of dentistry in this state, he afterwards, to wit, on or about the 18th day of March, 1883, presented his said diploma so received from the faculty of said Indiana Dental College, duly authenticated, to the Illinois State Board of Dental Examiners, and tendered to said board a fee of one dollar, as provided by law, and demanded that said board issue to him, the petitioner, a license to practice dentistry in the state of Illinois, as provided by law. Petitioner further shows to the court that it was the duty of said board of dental examiners, upon the presentation of said diploma, and the tender of the fee of one dollar, as aforesaid, to said board by said petitioner, and the demand, as aforesaid, to issue to petitioner a license to practice dentistry in the state of Illinois, and that the said board of dental examiners, not regarding their said duty in this behalf, thereupon, to wit, on the day last aforesaid, refused to issue to petitioner a license to practice dentistry in this state, and have continually refused, and still do refuse, to issue to petitioner such license. Petitioner further shows unto the court that the members of the said board of dental examiners are G. V. Black, A. W. Harlan, O. Wilson, J. J. Jennelle and George H. Cushing, and that by the failure and refusal of said board of dental examiners to so issue and grant petitioner a license to practice dentistry, as aforesaid, he, the petitioner, has been prevented from practicing dentistry in this state, as he is lawfully and by right entitled to do; that he has qualified himself for the practice of said profession at great expenditure of time and money, and depends upon the same for a living. Petitioner further shows unto the court that the determination of the questions involved in this petition is not only one of great importance to him individually, but is also a matter of public importance, as numbers of the graduates of said dental college, citizens of this state, and circumstanced like petitioner, desire to practice dentistry in this state, and are prevented therefrom by like refusal of said board of dental examiners. Wherefore being without other legal remedy, petitioner prays for a writ of mandamus, directed to the Illinois State Board of Dental Examiners, commanding them to forthwith receive from petitioner the fee of one dollar, and thereupon to issue to petitioner a license to practice dentistry in the state of Illinois, and to deliver the same to petitioner, and that such further order may be made in the premises as justice may require."

The Attorney General demurs to the petition.

Mr. Justice SCHOLFIELD delivered the opinion of the court.

It is provided by the first section of an act approved May 30, 1881, entitled "An act to insure the better education of practitioners of dental surgery, and to regulate the practice of dentistry in the state of Illinois," "that it shall be unlawful for any person who is not at the time of the passage of this act engaged in the practice of dentistry in this state, to commence such practice, unless such person shall have received a diploma from the faculty of some reputable dental college duly authorized by the laws of this state, or of some other of the United States, or by the laws of some foreign country, in which college or colleges there was, at the time of the issue of such diploma, annually delivered a full course of lectures and instruction in dental surgery." And in the sixth section of the same act, after providing for examination before the board of dental examiners of all applicants for license to practice dentistry, is the following provision: "But said board shall, at all times, issue a license to any regular graduate of any reputable dental college, without examination, upon the payment by such graduate to the said board of a fee of one dollar." Other provisions of the act prohibit any person to practice dentistry without a license from the board, except such as are properly enrolled as having been practitioners at the time of the passage of the act.

The contention of the relator is that the board of dental examiners have no power to decide what is, or what is not, a "reputable dental college"—that the law has itself defined what is a "reputable dental college," in providing that it shall be "duly authorized by the laws of this state, or some other of the United States, or by the laws of some foreign country, in which college * * * there was, at the time of the issue of such diploma, annually delivered a full course of lectures and instruction in dental surgery." We are unable to appreciate the force of this position. The word "reputable" would seem to be used here to express the meaning ordinarily attached to it. If it had been intended that a diploma from any dental college, or a diploma from any dental college "duly authorized by the laws of this state, or some other of the United States, or by the laws of some foreign country, in which college * * * there was, at the time of the issue of such diploma, annually delivered a full course of lectures and instruction in dental surgery," we must presume the language would have so said. By using the word "reputable," we must presume the General Assembly meant "reputable." And since it is not used as being the equivalent and convertible for the other requirements in regard to the college, but as in addition thereto, we must presume it was intended to be so construed.

As a part of the current history of the times, and as an aid in arriving at the legislative intention, we know there were colleges of different kinds authorized by the laws of states in which they were located, in which there were pretended to be annually delivered full

courses of lectures and instruction upon the arts and sciences professed to be taught, that were not "reputable," because they graduated for money, frequently without any reference to scholarship. A diploma from such an institution afforded no evidence of scholarship or attainments in its holder. It was a fraud, and deserved no respect from anybody, and it was as against such diplomas the law was intended to protect the public, and therefore required that the colleges be "reputable." Whether a college be reputable or not is not a legal question, but a question of fact. So, also, are the requirements in regard to the annual delivery of full courses of lectures and instruction. These questions of fact are, by the act, submitted to the decision of the board—not in so many words, but by the plainest and most necessary implication. Their action is to be predicated upon the existence of the requisite facts, and no other tribunal is authorized to investigate them, and of necessity, therefore, they must do so. The act of ascertaining and determining what are the facts, is in its nature judicial. It involves investigation, judgment, and discretion.

The office of the writ of mandamus is, in general, to compel the performance of mere ministerial acts prescribed by law. It lies, however, also to subordinate judicial tribunals, to compel them to act where it is their duty to act, but never to require them to decide in a particular manner. It is not, like a writ of error or appeal, a remedy for erroneous decisions. Judges of Oneida Common Pleas v. People, 18 Wend. (N. Y.) 92. And, as is said by the court in People v. Common Council of Troy, 78 N. Y. 33, 34 Am. Rep. 500: "This principle applies to every case where the duty, performance of which is sought to be compelled, is in its nature judicial, or involves the exercise of judicial power or discretion, irrespective of the general character of the officer or body to which the writ is addressed. A subordinate body can be directed to act, but not how to act, in a matter as to which it has the right to exercise its judgment. The character of the duty, and not that of the body or officers, determines how far performance of the duty may be enforced by mandamus. Where a subordinate body is vested with power to determine a question of fact, the duty is judicial, and though it can be compelled by mandamus to determine the fact, it can not be directed to decide it in a particular way, however clearly it be made to appear what the decision ought to be." See, also, Kelly et al. v. City of Chicago, 62 Ill. 279.

Illustrations of the principle will be found in People v. Common Council of Troy, supra; Freeman v. Selectmen, 34 Conn. 406; Hoole v. Kinkead, 16 Nev. 217; Bailey v. Ewart, 52 Iowa, 111, 2 N. W. 1009; Berryman v. Perkins, 55 Cal. 483; People v. Contracting Board, 27 N. Y. 378, and other cases cited in argument by the Attorney General.

The demurrer here does not admit that the board of dental examiners found that the college at which the relator was graduated was reputable, although it does admit, that [i. e., that he was graduated] to be the fact. But since the board cannot be compelled to decide the question that way, although the evidence might clearly sustain it in doing so, there is no ground for mandamus.

The demurrer must be sustained, and the petition dismissed.

Demurrer sustained.[3]

AYERS v. HATCH, Mayor, et al.

(Supreme Judicial Court of Massachusetts, 1900. 175 Mass. 489, 56 N. E. 612.)

Petition for mandamus by Henry W. Ayers against Arthur W. Hatch, Mayor, and others, to compel reinstatement to the office of City Assessor of the City of Everett. Dismissed.

MORTON, J.[4] * * * The remaining question is whether the removal was valid under the city charter, which provides that "any officer so appointed [i. e. by the mayor] may be removed by the mayor for such cause as he shall deem sufficient and shall assign in his order of removal, and the removal shall take effect upon the filing of the order therefor in the office of the city clerk and the service of a copy of such order upon the officer removed, either personally or at his last and usual place of abode." St. 1892, c. 355, § 29. The petitioner was appointed by the mayor. The charter provides that "the mayor shall be the chief executive officer of the city, and the executive powers of the city shall be vested in him and shall be exercised by him either personally or through the several officers and boards in their respective departments, under his general supervision and control." The responsibility for the due and proper administration of the affairs of the city is thus placed largely upon him, and, consistently therewith, he is given the power of removal. The fact, however, that removals are to be for cause, repels the idea of removal at pleasure, even though the sufficiency of the cause is for him to decide.

The question then arises, what jurisdiction has this court in regard to removals? The answer, it seems to us, is this: Cause implies, we think, a reasonable ground of removal, and not a frivolous or wholly unsatisfactory or incompetent ground of removal. If the cause assigned is a reasonable one, then, whether, under the circumstances, it is sufficient to justify a removal, is for the mayor to

[3] Accord: State ex rel. Kirchgessner v. Board of Health of Hudson County, 53 N. J. Law, 594, 22 Atl. 226 (1891); also, as to "suitable" persons in licensing sale of intoxicating liquors, Batters v. Dunning, 49 Conn. 479 (1882). But see, as to holding promotional examinations, when practicable, People ex rel. Williams v. Errant, 229 Ill. 56, 82 N. E. 271 (1907).

[4] Portions of this case are omitted.

decide, and his decision is final. But whether the cause assigned constitutes, of itself, as matter of law, ground for removal, is a question for this court to determine. In the present case the cause assigned was "the good of the service," and manifestly, it seems to us, that was good ground for removal. The natural inference would be that in some respect the petitioner had failed to perform his duties, or was incompetent or inefficient, or was an unsuitable person for the position to which he was appointed. If the charter provided, as in the New York cases relied on by the petitioner (People v. Mayor, etc., of New York, 19 Hun, 441; Same v. Nichols, 79 N. Y. 582; Same v. Board of Fire Com'rs of City of New York, 12 Hun, 500), that removals should be "for cause, and after an opportunity to be heard," no doubt he would have been entitled to a particular statement on the grounds embraced in the cause assigned. But we do not see how it can be said that the cause assigned is not in law a ground for removal.

The result is that we think that the petition should be dismissed. So ordered.[5]

HARRISON, MAYOR, et al. v. PEOPLE ex rel. RABEN.

(Supreme Court of Illinois, 1906. 222 Ill. 150, 78 N. E. 52.)

Mandamus by the People, on relation of Henry Raben, to compel Carter H. Harrison and others, as Mayor, City Clerk, and City Collector of the City of Chicago, to issue a dramshop license to relator. From a judgment of the Appellate Court, affirming a judgment, awarding the writ, respondents appeal. Reversed.

The people, on the relation of Henry Raben, filed a petition in the superior court of Cook county against the appellants, as mayor, city clerk, and city collector of the city of Chicago, for a writ of mandamus to compel them to issue to the relator a license to keep a dramshop at 345 East Division street, in said city. The respondents answered the petition, and upon a hearing the court awarded the writ as prayed. On appeal to the Appellate Court for the First District that order was affirmed, and the respondents now bring the case to this court by a further appeal.

The case was heard in the superior court upon an agreed state of facts, as follows:

"The only ordinance of the city of Chicago regulating the matter of granting licenses to keep dramshops is the following:

"'1175. The mayor of the city of Chicago shall from time to time grant licenses for the keeping of dramshops within the city of Chicago to persons who shall apply to him in writing therefor and shall furnish evidence satisfying him of their good character. Each

[5] See, also, Re Guden, 171 N. Y. 529, 64 N. E. 451 (1902).

applicant shall execute to the city of Chicago a bond, with at least two sureties to be approved by the city clerk or city collector, in the sum of $500, conditioned that the applicant shall faithfully observe and keep all ordinances in force at the time of the application or thereafter to be passed during the period of the license applied for, and will keep closed on Sundays all doors opening out upon any street from the bar or room where such dramshop is to be kept, and that all windows opening upon any street from such bar or room shall on Sundays, except between the hours of one o'clock a. m. and five o'clock a. m., be provided with blinds, shutters or curtains, so as to obstruct the view from such street into such room. Nor shall any windows be painted or covered in any manner so as to obstruct the view from such street into such room. No application for a license shall be considered until such bond shall have been filed.'

"It is admitted that the petitioner made his application for a license to keep a dramshop at the place in question, and that in so doing he did everything required of him by the laws or ordinances; that no question was or is made of the sufficiency of the bonds tendered by petitioner, or of his good character; and that his application was refused solely because the place where he proposed to keep his dramshop is immediately next to the grounds of the Lyman Trumbull School, one of the public schools of the city, the mayor being of opinion that he has a right to refuse a license when, in his judgment, the place in which it is proposed to keep a dramshop is one where a dramshop will be a detriment and an injury to the neighborhood and offensive to the best interests of society. It is further admitted that the south school building has not been used regularly in the past two years; that it has not been used but two or three times, though it is ready for use; that some of the rooms in the north school building are not used, as there are not enough scholars to require the use of the whole building; that the property is held for school purposes and intended for use as a school, and that the location of the proposed saloon with reference to the school and the surroundings is truthfully set out in the following plat."

The plat referred to is immaterial in the decision of the case.

WILKIN, J. (after stating the facts). The only question presented by this record for our decision is whether, under the ordinance set forth in the foregoing statement of facts, the mayor of the city of Chicago is authorized to exercise a discretion in the granting of a license to keep a dramshop, or whether, on the presentation of an application for such a license showing that the requirements of the ordinance have been complied with, he is compelled to grant the license.

It must be conceded that the business of keeping a saloon or dramshop is one which no citizen has a natural or inherent right to pursue, but is the subject of legislative restriction, regulation, and control. Schwuchow v. City of Chicago, 68 Ill. 444. Of course,

where an ordinance authorizes the issuing of a license to keep a dramshop upon certain terms and conditions, the authorities authorized to grant the license cannot arbitrarily refuse the same, nor discriminate between persons, places, and regulations pertaining to the business, without reasonable grounds therefor. Zanone v. Mound City, 103 Ill. 552. We are, however, of the opinion that there is vested in such authorities, unless expressly restricted by the language of the ordinance, a discretionary power, which may be reasonably exercised in the granting or refusing to issue a license.

The question does not seem to have been directly passed upon by this court, but the authorities from other states fully sustain this reasonable construction. In many of these cases the language of the law or ordinance authorizing the granting of the license is that, upon the doing of certain things, the licensing officer or body shall grant the license; but the decisions are to the effect that, nevertheless, a discretion exists in such officer or body, and that they will not be compelled to issue a license when in their discretion, reasonably and fairly exercised, the license has been refused. Leigton v. Maury, 76 Va. 865; People v. Board of Excise, 91 Hun, 94, 36 N. Y. Supp. 678; Sherlock v. Stuart, 96 Mich. 193, 55 N. W. 845, 21 L. R. A. 580; Attorney General v. Justices, 27 N. C. 315; Muller v. Commissioners, 89 N. C. 171; Hillsboro v. Smith, 110 N. C. 417, 14 S. E. 972; Perry v. Salt Lake City, 7 Utah, 143, 25 Pac. 739, 998, 11 L. R. A. 446; Eslinger v. East, 100 Ind. 434.

This question was before the Appellate Court for the First District in the case of Swift v. People, 63 Ill. App. 453, and that court, in a well-considered opinion, held that the mayor of the city of Chicago could not be compelled by mandamus to issue a license to keep a dramshop in a neighborhood occupied almost exclusively by residents, and where a saloon would be a nuisance.

The trial court in this case held propositions of law to the effect that the mayor had the right to exercise a discretion in granting or refusing the license, among others the following: "It is within the mayor's right to refuse to grant a license to keep a dramshop at a place where it will be so close to a school as to be a detriment and injury to the neighborhood or offensive to the best interests of society." Notwithstanding this holding, which we think a correct announcement of the law, the writ was granted. The judgment could only be reconciled with the holdings as to the law of the case, upon the theory that the discretionary power vested in the mayor had been abused. But that position is untenable. By the stipulation it is agreed that the relator sought a license to keep his saloon immediately next to the grounds of the Lyman Trumbull School, one of the public schools of the city. The mayor was of the opinion that he had a right to refuse a license when in his judgment the place in which it is proposed to keep a dramshop will be a detriment and in-

jury to the neighborhood and offensive to the best interests of society.

It is true that it is stipulated that the school building has not been used regularly in the past two years, though it is ready for use, and that some of the rooms in the north school building are not used, as there are not enough scholars to require the use of the whole building. Both school buildings are on the same grounds, and it is agreed that the purpose is to establish a saloon in the immediate vicinity of these school buildings and the playgrounds. We apprehend that no one will seriously contend that a saloon adjacent to or in the immediate neighborhood of public schools will not tend, in a greater or less degree, to demoralize and disturb school children. We are clearly of the opinion that upon the facts in this case there was no such abuse of discretion on the part of the mayor as would justify the courts in compelling him to grant the license applied for.

The judgment of the Appellate Court will be reversed, and the cause will be remanded to the superior court, with directions to dismiss the petition.

Judgment reversed.[6]

SECTION 9.—CONSIDERATIONS GUIDING DISCRETION

REG. v. BOTELER et al.

(Court of Queen's Bench, 1864. 4 Best & S. 959.)

Poland obtained a rule on behalf of the Board of Guardians of the Bridgend and Cowbridge Union, calling upon Robert Boteler and John Samuel Gibbon, Esquires, justices of the peace for the county of

[6] Accord: Muller v. Com'rs of Buncombe Co., 89 N. C. 171 (1883). See, also, People ex rel. Schwab v. Grant, 126 N. Y. 473, 27 N. E. 964 (1891).

In other cases, in accordance with the terms of the statute, the issue of the liquor license has been held to be a ministerial duty. State ex rel. Fitzpatrick v. Meyers, 80 Mo. 601 (1883); McLeod v. Scott, 21 Or. 94, 26 Pac. 1061, 29 Pac. 1 (1891); Henry v. Barton, 107 Cal. 535, 40 Pac. 798 (1895).

In New York, the liquor tax law of 1896 (Laws 1896, c. 112) made the right to sell liquor independent of any administrative discretion. See section 19 of act as amended in 1897 (Laws 1897, c. 312); People ex rel. Belden Club v. Hilliard, 28 App. Div. 140, 50 N. Y. Supp. 909 (1898).

Discretion as to renewal of licenses, see the elaborate opinions in Sharp v. Wakefield [1891] App. Cas. 173. The matter was subsequently dealt with by the English Licensing Act, 1904. See article on Property in Licenses, 24 Law Quarterly Review, 49.

Further, regarding the judicial control of administrative discretion, see cases under mandamus.

The word "may" is often construed as "shall." See Mason v. Fearson, 9 How. 248, 13 L. Ed. 125 (1850); Lewis' Sutherland, Statutory Construction, §§ 634–640.

Glamorgan, and Robert Charles Nicholl Carne, overseer of the poor of the parish of Nash, in that Union, to show cause why the said justices should not issue their warrant to levy, by distress and sale of the goods and chattels of the said R. C. N. Carne, the sum of £14. 11s., the amount ordered by the guardians of the poor of the Union to be paid by him from the poor rates of the parish, towards the relief of the poor thereof, and as the contribution of the parish to the common fund of the Union. * * *

Carne having refused to obey the order, the guardians obtained a summons against him under St. 2 & 3 Vict. c. 84, § 1. Upon the hearing of the summons, on the 6th October, 1863, he appeared in person, and, evidence having been given in support of the application, Carne contended that the proof of notice to him of his appointment as overseer of the parish of Nash was not sufficient, but the justices decided that it was. Carne did not produce any evidence, but contended that, as the parish of Nash had not at that time any paupers chargeable to it, it was unjust and unreasonable that the ratepayers thereof should be called upon to pay anything towards the expenses of the Union; that it was in the discretion of the justices whether payment of the contribution should or should not be enforced; and urged upon them that, as the order for contribution was unjust, they should exercise that discretion and refuse to enforce payment. The justices, addressing Carne, said: "We have given the matter our best consideration and think you have shown sufficient cause to justify us in refusing the warrant." They then, at the request of Carne, added to their decision a statement that they refused the warrant in the exercise of their discretion.

St. 2 & 3 Vict. c. 84, § 1: "In every case in which any contribution by overseers or other officers of any parish of monies required by the board of guardians or persons acting as guardians for such parish, or for any Union which shall include such parish for the performance of their duties, shall be in arrear, it shall be lawful for any two justices acting within the district wherein such parish shall be situate, on application under the hand of the chairman or acting chairman of such board, to summon the said overseer or other officers to show cause, at a special sessions to be summoned for the purpose, why such contribution has not been paid, and after hearing the complaint preferred under the authority of such chairman or acting chairman, and on behalf of such board, if the justices at such sessions shall think fit, by warrant under their hands and seals to cause the amount of the contribution so in arrear, together with the costs occasioned by such arrear, to be levied and recovered from the said overseers or other officers, or any of them, in like manner as monies assessed for the relief of the poor may be levied and recovered, and the amount of such arrear, together with the costs as aforesaid, when levied and recovered, to be paid to the said board."

COCKBURN, C. J.[7] I do not intend in the slightest degree to encroach upon the doctrine that, where magistrates have a discretionary power to decide whether they will do an act or not, this court will not order them to do it when they have exercised their discretion upon the merits of the matter. But it is clear, upon the facts of the present case, that they have not exercised that discretion which in law they would have been justified in exercising. This extra-parochial place, having been made part of a Union, became liable by law to contribute its share to the general expenses of the Union; and the magistrates, having that fact established before them, ought to have issued their warrant. It is equally clear that the reason why they did not do so was because they were invited to exercise their discretion on a matter which was not within it. They proceeded upon the ground that the annexation of this extra-parochial place to the Union was unjust; in other words, that the operation of the act of Parliament under which that was effected was unjust. Their decision virtually amounts to this: "We know that upon all other grounds we ought to issue our warrant, but we will take upon ourselves to say that the law is unjust, and therefore, we will not issue it." That is not a tenable ground on which this court can allow magistrates to decline to exercise their discretion according to law. It would be an evil example if we held that they might thus arbitrarily and illegally exercise their discretion; and therefore this rule must be made absolute, with costs.[8]

ILLINOIS STATE BOARD OF DENTAL EXAMINERS v. PEOPLE ex rel. COOPER.

(Supreme Court of Illinois, 1887. 123 Ill. 227, 13 N. E. 201.)

Appeal from appellate court, First district; L. C. Collins, Judge.

MAGRUDER, J. This is a petition for mandamus, in which the relator prays that the Illinois state board of dental examiners may be commanded to issue to him a license to practice dentistry and dental surgery in the state of Illinois.

The statute under which the petition is filed, and which defines the powers and prescribes the duties of the state board of dental examiners, is "An act to secure the better education of practitioners of dental surgery, and to regulate the practice of dentistry in the state of Illinois," approved May 30, 1881, in force July 1, 1881. Hurd's Rev. St. 1885, c. 91, p. 816. The sixth section of this act is as follows: "Any and all persons who shall so desire, may appear before said board at any of its regular meetings, and be examined

[7] Part of this case is omitted.

[8] See Martin v. Symonds, 4 Misc. Rep. 6, 23 N. Y. Supp. 689 (1893). See, however, John Giles' Case, 2 Str. 881 (1731); Ex parte Persons, 1 Hill (N. Y.) 655 (1841).

with reference to their knowledge and skill in dental surgery; and, if the examination of any such person or persons shall prove satisfactory to said board, the board of examiners shall issue to such persons as they shall find from such examination to possess the requisite qualifications a license to practice dentistry in accordance with the provisions of this act. But said board shall, at all times, issue a license to any regular graduate of any reputable dental college without examination, upon the payment, by such graduate, to the said board, of a fee of one dollar. All licenses issued by said board shall be signed by the members thereof, and be attested by its president and secretary; and such license shall be prima facie evidence of the right of the holder to practice dentistry in the state of Illinois." The first section of the act provides "that it shall be unlawful for any person who is not at the time of the passage of this act engaged in the practice of dentistry in this state, to commence such practice, unless such person shall have received a diploma from the faculty of some reputable dental college duly authorized by the laws of this state, or of some other of the United States, or by the laws of some foreign country, in which college or colleges there was, at the time of the issue of such diploma, annually delivered a full course of lectures and instruction in dental surgery," etc.

In People v. Dental Examiners, 110 Ill. 180, we held that the act did not specifically define what was a reputable college, and that it was left to the discretion and judgment of the board to determine what was a reputable college. In that case the mandamus was refused on the general ground that the writ will not lie to compel the performance of acts or duties which necessarily call for the exercise of judgment and discretion on the part of the officer or body at whose hands their performance is required.

But if a discretionary power is exercised with manifest injustice, the courts are not precluded from commanding its due exercise. They will interfere, where it is clearly shown that the discretion is abused. Such abuse of discretion will be controlled by mandamus. A public officer or inferior tribunal may be guilty of so gross an abuse of discretion, or such an evasion of positive duty as to amount to a virtual refusal to perform the duty enjoined, or to act at all in contemplation of law. In such a case mandamus will afford a remedy. Tap. Mand. 19, 66; Wood, Mand. 64; Lynah v. Commissioners, 2 McCord (S. C.) 170; People v. Perry, 13 Barb. (N. Y.) 206; Arberry v. Beavers, 6 Tex. 457, 55 Am. Dec. 791.

In Village of Glencoe v. People, 78 Ill. 382, we said: "The discretion vested in the council cannot be exercised arbitrarily, for the gratification of feelings of malevolence, or for the attainment of merely personal and selfish ends. It must be exercised for the public good, and should be controlled by judgment, and not by passion or prejudice. When a discretion is abused, and made to work injustice, it is admissible that it shall be controlled by mandamus."

In the present case the demurrer admits all the allegations of the petition to be true. It will be necessary to examine those allegations to see if they show any abuse of discretion on the part of the board, or any unjust exercise of the discretionary power vested in it.

The petition alleges that the relator complied with the requirements of the statute, and with the rule of the board adopted in September, 1884. That rule is as follows: "Resolved, that after June, 1885, the Illinois state board of dental examiners will recognize as reputable only such dental colleges as require, as a requisite for graduation, attendance upon two full, regular courses of lectures and practical instruction, which courses shall each be of not less than five months' duration, and shall be held in separate years, with practical instruction intervening between the courses. Such colleges must also require a preliminary examination before admitting students to matriculation, provided that no certificate from a high or normal school, or other literary institution, is presented by the candidate."

On November 4, 1884, the relator matriculated as a student in the Chicago College of Dental Surgery, with which four of the five members of the appellant board are alleged to be connected as instructors or members of the faculty, and pursued his studies there during a period of not less than five months in 1884 and 1885. During the summer and fall of 1885 he received practical instruction in dentistry and dental surgery. On November 2, 1885, he matriculated as a student in the Northwestern College of Dental Surgery, which gives such lectures and instructions as are required by the above rule, and attended therein as a student during one course of instruction of not less than five months in the years 1885 and 1886. A diploma was issued to him by the last-named college on April 3, 1886. On May 11, 1886, he presented this diploma to the state board of dental examiners at a regular meeting thereof, and tendered his fee of one dollar, and demanded a license. The board has refused to issue the license.

The petition avers that the board so refused to give him a license through malice, because he left the Chicago College, in which four members of the board are interested, and graduated at the Northwestern College. It also avers that the two colleges are rivals for the patronage of students; that the board is under the control of the Chicago College, and determined to break down the Northwestern College; and that the refusal to issue the license springs from a determination to protect their own college from competition.

If these averments are true, the members of the state board are abusing their discretion, and making an unjust use of it. They have a right to decide whether the college at which an applicant for license has graduated is reputable or not. But they must decide that question upon just and fair principles. The discretion with which they are vested was conferred upon them in the interests of the public, and to protect the people from unskillful and uneducated practitioners of dentistry. If four of the five members which compose the board

are instructors in a particular college, and if they are making use of their power under the state law to build up their own institution, and crush out its rival, they are acting from motives of self-interest, and not in the interests of the public. It cannot be tolerated that licenses should be withheld for any such unworthy reasons. Inasmuch as the board has elected to stand by the overruled demurrer to the petition, we are bound to assume that the statements of the petition are true.

Again, the relator says in his petition that after his application on May 11, 1886, he wrote on May 25th to the secretary of the board and inquired why a license was not issued to him. On May 26th the secretary wrote in reply, returning the one dollar, and saying: "The matter of issuing a license on your diploma from the Northwestern College of Dental Surgery was referred to the national association of dental examiners, which will meet in August. Until their decision, I cannot issue any license." It appears that the association here referred to is composed, for the most part, of men living outside of this state, and that its meeting "in August" was to take place in the state of New York.

When a regular graduate of a dental college applies to the board of examiners for a license, the only question for them to determine is whether the college at which the applicant graduated is reputable or not. The law clothes them, and no other body, with the power to decide this question. They cannot delegate their discretionary power to an organization beyond the limits of the state. By the letter of the secretary the board declined to perform the duty imposed upon it by the Illinois statute, and announced its intention of referring the question of issuing a license to a foreign association.

After this announcement, upon being threatened with a mandamus proceeding, the board, in an official communication, signed by its secretary, promised the relator's attorney that, if he would wait a reasonable time, it would call a meeting, and would issue to the relator the license which he demanded. The meeting was held on June 25, 1886, but the license was refused. When the board promised to issue a license, it must have been of the opinion that the relator was entitled to it, and they could not have considered him entitled to it unless they regarded the college at which he had graduated as reputable.

It is claimed by counsel for appellee that the board, by adopting the above rule, has exercised its discretion in determining what is a reputable dental college; that any college, which insists upon such requisites for graduation as the rule prescribes, must be recognized by the board as a reputable college; and that as the Northwestern College has brought itself within the requirements of the rule, the board has no discretion about admitting its graduates. On the other hand, counsel for appellant insists that while no colleges which fail to comply with the rule will be regarded as reputable, yet the board

would have a right to demand other requisites than those specified in the rule before deciding a college to be reputable.

We are not prepared to hold that a dental college which requires a preliminary examination before admitting students to matriculation, and which requires students before graduation to attend upon two full regular courses of lectures and practical instructions, each to be of not less than five months' duration, and to be held in separate years, with practical instructions intervening between the courses, may not in other respects lack some of the elements which make such an institution reputable. "Reputable," according to Webster's definition, means "worthy of repute or distinction;" "held in esteem;" "honorable;" "praiseworthy." A college might have examinations and lectures and instructions of such an inferior character, and under the direction of such inferior instructors, that it would be unworthy of praise and undeserving of esteem.

But the petition in this case alleges that the Northwestern College has been recognized by the board of examiners as a reputable dental college, and was so recognized when the relator presented his diploma.

As the board did not refuse to grant the license on the ground that the Northwestern College was not reputable, but refused such license on other grounds, as stated in the petition, it will be presumed that the members regarded that college as reputable. They had no discretion as to any other matter than the character of the college issuing the diploma, as to its being reputable or not reputable. When that matter was decided and out of the way, their judicial or discretionary power was exhausted. The duty to issue the license was then a mere ministerial one, and its performance could be enforced by mandamus.

We think that the allegations of the petition, considered as a whole, warranted the issuance of the writ of mandamus.

The judgment of the appellate court is affirmed.[9]

DODD et al. v. FRANCISCO et al.

(Supreme Court of New Jersey, 1902. 68 N. J. Law, 490, 53 Atl. 219.)

Certiorari to review proceedings of state board of health in reversing action of local authorities, and granting permission to locate a cemetery in the town of Bloomfield.

DIXON, J.[10] * * * There remains only the fourth reason assigned for reversal—that the board based its conclusion on sanitary grounds alone.

If this reason were supported by proper proof we would be inclined to deem it fatal to the resolution under review. While the statute,

[9] Accord: State ex rel. Johnston v. Lutz, 136 Mo. 633, 38 S. W. 323 (1896).

[10] Only part of the opinion is printed. For other part, see post, p. 200.

by requiring the concurrence of the municipal council and the local board of health in the first instance, seems fairly to imply a division of function between them, so that the board of health may pass upon sanitary questions only, and the municipal council upon the other questions pertinent to the matter in hand, it seems likewise, by confiding to the state board of health the power of affirming or reversing the action of either or both of these local bodies, to imply that all pertinent questions are open for consideration by the state board.

But we think the reason is not properly supported. What appears is that one or perhaps more than one member thought that only sanitary considerations should have weight; but it is at least doubtful whether the board, then composed of eight members, adopted this view. As already stated, every suggestion which anybody desired to present was entertained by the board, and we think the board is entitled to the presumption that every suggestion had its due influence. That presumption should stand until the board itself certifies to the contrary, or until, a rule to obtain a certificate from the board proving ineffectual, clear proof to the contrary is produced aliunde. See Newark v. North Jersey Street Railway Co., 68 N. J. Law, 486, 53 Atl. 219.

We find no error, and the resolution of May 22, 1902, is affirmed, with costs.[11]

In re SPARROW.

(Supreme Court of Pennsylvania, 1890. 138 Pa. 116. 20 Atl. 711.)

PAXSON, C. J. This was a writ of alternative mandamus directed to Hon. S. S. Mehard, president judge of the court of quarter sessions of Mercer county, requiring him to show cause why he should not grant a license to sell liquor at retail to George L. Sparrow, the petitioner. To the alternative writ, the learned judge makes a very full return, setting forth, inter alia:

(a) "That the said applicant is a citizen of the United States, and of this commonwealth, of temperate habits, and of good moral character."

(b) "That the National Hotel, for which said license was prayed, was then and still is a good hotel, and necessary for the accommodation of the public and the entertainment of strangers and travelers."

(c) "That the borough of Greenville, where the said hotel is located, has a population of nearly 4,000 persons, and there was then and is now no licensed house in said borough, or within 12 miles of it."

(d) "That remonstrances were filed against said application wherein it was alleged that said license was not a matter of public necessity;

[11] Statutory appeal from act involving exercise of discretion, see Hopson's Appeal, 65 Conn. 140 (1894), post, p. 525; also, Keiser v. Lines, 57 Ind. 431 (1877); Miller v. Wade, 58 Ind. 91 (1877); Thompson v. Koch, 98 Ky. 400, 33 S. W. 96 (1895), post, p. 523.

that said license was not necessary for the accommodation of the public, and the entertainment of strangers and travelers; and that the granting of said license would be detrimental to the public good, and an injury instead of a benefit to that community."

(e) "That these remonstrances were signed by 870 citizens of said borough of Greenville, of whom 217 were males, and 653 were females, and all of whom were above the age of 21 years."

(f) "That additional petitions, asking that said license be granted, were likewise filed, wherein it was alleged that such license was necessary for the accommodation of the public, and the entertainment of strangers and travelers; and that the applicant was a fit person to whom to grant such license. That said additional petitions were signed by 592 citizens of said borough, of whom 471 were males and 121 females, all of whom were above the age of 21 years."

(g) "That thereupon your respondent, representing the court of quarter sessions of the peace, in and for the county of Mercer, having due regard to the number and character of the petitioners for and against said application, considered that the clear preponderance was in favor of the remonstrants and against the petitioners; and therefore, determining that the license prayed for was not necessary for the accommodation of the public and entertainment of strangers or travelers, refused to grant the same."

(h) "The respondent respectfully states that he is of opinion that, notwithstanding all the facts favorable to complainant's application above set forth, the preponderance of the remonstrants against, over the petitioners for, said license, was of itself a sufficient ground for concluding that the same was not a matter of public necessity, and therefore a just and lawful ground for refusing to grant it; and that this opinion is based upon our acts of assembly as interpreted by your honorable court."

It would have been sufficient for the learned judge below to have returned that he had considered the petitions and the remonstrances, and that, in the exercise of his discretion, he had refused the license. His return is very full, however, and he has placed upon the record all the facts bearing upon this application. It presents a case differing in many respects from any we have had before us, and we may assume that he made such return in order to enable us to apply the law to the peculiar facts of the case.

We have decided repeatedly, in language too plain to be misunderstood, that the granting of a license to sell liquor by retail rests in the sound discretion of the court below. In Reed's Appeal, 114 Pa. 452, 6 Atl. 910, we said: "The action of the court in granting the license complained of is something that we cannot review, that being a matter of discretion, though we are satisfied that there was a misapprehension of the act of 22d March, 1867." In the late case of In re Raudenbusch, 120 Pa. 328, 14 Atl. 148, in alluding to this discretion, we said: "It has been exercised by that court [quarter sessions] time out of

mind, and the power has again and again been affirmed by this court. This discretion, however, is a legal discretion, to be exercised wisely, and not arbitrarily. A judge who refuses all applications for license, unless for cause shown, errs as widely as the judge who grants all applications. In either case, it is not the exercise of judicial discretion, but of arbitrary power. The law of the land has decided that licenses shall be granted to some extent, and has imposed the duty upon the court of ascertaining the instances in which the license shall be granted. In order to perform this duty properly, the act of assembly has provided means by which the conscience of the court may be informed as to the facts. It may hear petitions, remonstrances, or witnesses, and we have no doubt the court may, in some instances, act of its own knowledge." In Schlaudecker v. Marshall, 72 Pa. 200, Mr. Justice Agnew, in referring to the same subject, said: "Whether any or all licenses should be granted, is a legislative, not a judicial, question. Courts sit to administer the law fairly, as it is given to them, and not to make or repeal it. The law of the land has determined that licenses shall exist, and has imposed upon the court the duty of ascertaining the proper instances in which the license shall be granted, and therefore has given it to the court to decide upon each case as it arises in due course of law. The act of deciding is judicial, and not arbitrary or willful. The discretion vested in the court is, therefore, a sound judicial discretion; and, to be a rightful judgment, it must be exercised in the particular case, and upon the facts and circumstances, before the court, and after they have been heard and duly considered—in other words, to be exercised upon the merits of each case, according to the rule given by the act of assembly. To say that I will grant no license to any one, or that I will grant it to every one, is not to decide judicially on the merits of the case, but to determine beforehand without a hearing or else to disregard what has been heard. It is to be determined not according to law, but outside of law, and it is not a legal judgment, but the exercise of an arbitrary will."

I have given these copious extracts from the opinions of this court to emphasize the fact that the law not only gives to the judges of the court of quarter sessions the discretion of granting or refusing licenses, but also requires such discretion to be exercised in a sound judicial manner, and also casts upon them the responsibility. That responsibility they cannot evade by throwing it upon the remonstrants or upon this court. To refuse a license, because, in the mind of the judge, there is a belief that licenses should not be granted at all, as a matter of policy, is to make law, not to administer it. The judge to whom an application is made may inform his conscience in the manner before pointed out. He may hear remonstrances, and it is his duty to give them due weight, but, after all, the responsibility rests with him, and he must exercise his own judgment and discretion in the light which such aids have furnished. In the case in hand, there appears to have been an unusual effort, both for and against the application.

The number of remonstrants considerably exceeds that of the petitioners. This is all very well so far as it is addressed to the discretion of the court. The result is not conclusive upon him. Otherwise, we would have local option without the sanction of an act of assembly, yet enforced by the judiciary. In the case in hand, the learned judge has undoubtedly attached great weight to the remonstrances. He does not appear, however, to have wholly substituted the judgment of the remonstrants for his own. The most that can be said is that they were of sufficient weight to convince him that the license was not a matter of public necessity. In the view we take of the case, this was not an abuse of discretion. We are not called upon to say whether it was exercised wisely.

Mandamus refused.

In re GROSS' LICENSE.

(Supreme Court of Pennsylvania, 1894. 161 Pa. 344, 29 Atl. 25.)

Appeal from court of quarter sessions, Luzerne county.

Application by Herman Gross for wholesale liquor license. From a decree refusing it, applicant appeals. Affirmed.

DEAN, J. This is the decree from which is brought this appeal: "Now, March 1, 1894, after hearing, sureties on the within bond are approved, and the license, as prayed for, is refused." Counsel for appellant, to sustain his appeal, argues that as there was no denial of the necessity for the license, and no allegation that the applicant was not a fit person, and as it appeared from the decree the bond and sureties were approved, the inference necessarily is that the refusal was not the exercise of discretion, but the result of arbitrary will.

Such inference is not warranted by the facts. The sixth section of the act of June 9, 1891 (P. L. 259), providing for licenses to wholesale dealers in liquors, says: "The court of quarter sessions shall hear petitions from residents of the county, in addition to that of the applicant, in favor of and remonstrance against the application for such license, and in all cases shall refuse the same whenever, in the opinion of said court, having due regard to the number and character of the petitioners for and against such application, such license is not necessary for the accommodation of the public, or that the applicant or applicants is or are not fit persons to whom such licenses should be granted." This section must be read in connection with the second of the same act, which directs the court to fix, by rule or standing order, a time at which all applications for and objections to licenses shall be heard by evidence, petition, remonstrance, or counsel. The two sections enjoin upon the court the duty of hearing and considering. If there be nothing on the records of the court but the averments in the petition, these, at the time fixed, must be heard and considered. The court may hear oral testimony or the arguments of counsel on either

side. It may, of its own knowledge of the unfitness of the applicant, or of his failure in other material particulars to meet the requirements of the law, refuse the application, just as it may, of its own knowledge, approve, for sufficiency, or reject, for insufficiency, the sureties on the bond. The exercise of judicial discretion by the court is commanded by the statute. This being so, how far this court will go in reviewing the decrees of the quarter sessions, notwithstanding repeated decisions, seems still to be in doubt. Therefore, we again say:

1. The discretion must be exercised in a lawful manner. The applicant has a right to be heard, and so have objectors. A decree without hearing, or opportunity for hearing, at a time fixed by rule or standing order, as the law directs, would be manifestly illegal and on certiorari, would be set aside.

2. If the court has, in a lawful manner, performed the duty imposed upon it, it is not our business to inquire whether it has made a mistake in its conclusions of fact. Whether the same facts induce in our minds the same belief as in that of the court below, as to the character of the applicant, or other material averments, is wholly immaterial. It is the discretion of the court of quarter sessions, not ours, that the law requires.

3. A decree made arbitrarily, or in violation of law, it is our plain duty to set aside. For example, if a judge should refuse a license because, in his opinion, the law authorizing licenses is a bad law, or if he should grant all licenses because he believed the law wrong, as tending to confer a privilege on a special few, in either case there would be no exercise of judicial discretion. Both would be the mere despotic assertion of arbitrary will by one in power,—that sort of lawlessness which is least excusable, and excites most indignation.

4. If the record shows the decree was had after hearing at a time fixed by rule or standing order, the presumption is that the decree is judicial, and not arbitrary; and this presumption is not rebutted by an argument from evidence that the court ought to have reached a different conclusion. In the case before us the record shows the license was refused after hearing. The act is an official one, performed by a public officer in the exercise of the functions of his office. The presumption, in all such cases, is that the officer performed his duty according to law. He is not bound to set out legal reasons for his action. He is only bound to have them.

In Re Johnson's Appeal, 156 Pa. 322, 26 Atl. 1066, relied on by appellant, the decree showed no hearing, nor did the record anywhere indicate that the decree was founded on a hearing, or that any opportunity to be heard had been afforded the applicant. The decree was reversed, and the case sent back, that it might be heard and decided as the law directs. While, in these cases, the justices of the quarter sessions do not always set out on the record the reasons for their decrees, it is going very far to assume from that fact alone, as is done in

the argument of this case, that they are made without lawful reasons. We can comprehend how a man's conscience may condemn as wrong a law of the land. But that sort of a conscience, so tender as to withhold approval of a law, yet which voluntarily takes an oath to administer it according to its true intent and meaning, and then deliberately violates it, is beyond our comprehension. We will not assume, without incontrovertible evidence, of record, that there is such an one.

The decree is affirmed, and the appeal is dismissed, at cost of appellant.[12]

SECTION 10.—VALIDITY OF UNREGULATED DISCRETION

WILSON v. EUREKA CITY.

(Supreme Court of United States, 1899. 173 U. S. 32, 19 Sup. Ct. 317, 43 L. Ed. 603.)

In error to the Supreme Court of the state of Utah.

Section 12 of Ordinance No. 10 of Eureka City, Utah, provided as follows: "No person shall move any building or frame of any building, into or upon any of the public streets, lots or squares of the city, or cause the same to be upon, or otherwise to obstruct the free passage of the streets, without the written permission of the mayor, or president of the city council, or in their absence a councilor. A violation of this section shall on conviction, subject the offender to a fine of not to exceed twenty-five dollars."

The plaintiff in error was tried for a violation of the ordinance, in the justice's court of the city. He was convicted and sentenced to pay a fine of $25. He appealed to the district court of the First judicial district of the territory of Utah.

On the admission of Utah into the Union, the case was transferred to the Fifth district court of Juab county, and there tried on the 24th of October, 1896, by the court without a jury, by consent of the parties.

Section 12, supra, was offered and admitted in evidence. Plaintiff in error objected to it, on the ground that it was repugnant to section 1 of article 14 of the Constitution of the United States, in that it delegated an authority to the mayor of the city, or, in his absence, to a councilor.

There was also introduced in evidence an ordinance establishing fire limits within the city, providing that no wooden buildings should be erected within such limits except by the permission of the committee

[12] See, also, In re Licenses, 4 Luz. Leg. Reg. (Pa.) 527 (1888). And see cases under mandamus, § 53.

on building, and providing further for the alteration and repair of wooden buildings already erected. * * *

The evidence showed that the plaintiff in error was the owner of a wooden building of the dimensions of 20 by 16 feet, which was used as a dwelling house. It was constructed prior to the enactment of the ordinances above mentioned. The evidence further showed that plaintiff in error applied to the mayor for permission to move the building along and across Main street in the city to another place within the fire limits. The mayor refused the permission, stating that, if the desire was to move it outside of the fire limits, permission would be granted. Notwithstanding the refusal, the plaintiff in error moved the building, using blocks and tackle and rollers, and, in doing so, occupied the time between 11 a. m. and 3 p. m. At the place where the building stood originally, the street was 50 feet from the houses on one side to those on the other, part of the space being occupied by sidewalks, and the balance by the traveled highway. The distance of removal was 206 feet along and across Main street. Eureka City was and is a mining town, and had and has a population of about 2,000. It was admitted that the building was moved with reasonable diligence.

The plaintiff in error was again convicted. From the judgment of conviction he appealed to the Supreme Court of the state, which court affirmed the judgment (15 Utah, 53, 48 Pac. 41; 15 Utah, 67, 48 Pac. 150, 62 Am. St. Rep. 904), and to the judgment of affirmance this writ of error is directed.

Eureka City has no special charter, but was incorporated under the general incorporation act of March 8, 1888, and among the powers conferred by it on city councils are the following:

"(10) To regulate the use of streets, alleys, avenues, sidewalks, cross walks, parks and public grounds.

"(11) To prevent and remove obstructions and encroachments upon the same."

The error assigned is that the ordinance is repugnant to the fourteenth amendment of the Constitution of the United States, because "thereby the citizen is deprived of his property without due process of law," and "the citizen is thereby denied the equal protection of the law."

Mr. Justice McKenna, after stating the facts in the foregoing language, delivered the opinion of the court.

Whether the provisions of the charter enabled the council to delegate any power to the mayor is not within our competency to decide. That is necessarily a state question, and we are confined to a consideration of whether the power conferred does or does not violate the Constitution of the United States.

It is contended that it does, because the ordinance commits the rights of plaintiff in error to the unrestrained discretion of a single individual, and thereby, it is claimed, removes them from the domain of law. To support the contention, the following cases are cited: In re Frazee, 63

Mich. 396, 30 N. W. 72, 6 Am. St. Rep. 310;[13] State v. Dering, 84 Wis. 585, 54 N. W. 1104, 19 L. R. A. 858, 36 Am. St. Rep. 948; Anderson v. City of Wellington, 40 Kan. 173, 19 Pac. 719, 2 L. R. A. 110, 10 Am. St. Rep. 175; Mayor, etc., v. Radecke, 49 Md. 217, 33 Am. Rep. 239; City of Chicago v. Trotter, 136 Ill. 430, 26 N. E. 359.[14]

With the exception of Mayor, etc., v. Radecke, these cases passed on the validity of city ordinances prohibiting persons parading streets with banners, musical instruments, etc., without first obtaining permission of the mayor or common council or police department. Funeral and military processions were excepted, although in some respects they were subjected to regulation. This discrimination was made the basis of the decision in State v. Dering; but the other cases seem to have proceeded upon the principle that the right of persons to assemble and parade was a well-established and inherent right, which could be regulated, but not prohibited or made dependent upon any officer or officers, and that its regulation must be by well-defined conditions.

This view has not been entertained by other courts, or has not been extended to other instances of administration. The cases were reviewed by Mr. Justice McFarland, of the Supreme Court of California, in Re Flaherty, 105 Cal. 558, 38 Pac. 981, 27 L. R. A. 529, in which an ordinance which prohibited the beating of drums on the streets of one of the towns of that state, "without special permit in writing so to do first had and obtained from the president of the board of trustees," was passed on and sustained. Summarizing the cases, the learned justice said:

"Statutes and ordinances have been sustained prohibiting awnings without the consent of the mayor and aldermen (Pedrick v. Bailey, 12 Gray [Mass.] 161); forbidding orations, harangues, etc., in a park without the prior consent of the park commissioners (Com. v. Abrahams, 156 Mass. 57, 30 N. E. 79), or upon the common or other grounds, except by the permission of the city government and committee (Com. v. Davis, 140 Mass. 485, 4 N. E. 577); 'beating any drum or tambourine, or making any noise with any instrument for any purpose whatever, without written permission of the president of the village,' on any street or sidewalk (Vance v. Hadfield, 51 Hun, 620, 643, 4 N. Y. Supp. 112); giving the right to manufacturers and others to ring bells and blow whistles in such manner and at such hours as the board of aldermen or selectmen may in writing designate (Sawyer v. Davis, 136 Mass. 239, 49 Am. Rep. 27); prohibiting the erecting or repairing of a wooden building without the permission

[13] See, however, Love v. Judge of Recorder's Court, 128 Mich. 545, 87 N. W. 785, 55 L. R. A. 618 (1901).

[14] See, also, Cicero Lumber Co. v. Cicero, 176 Ill. 9, 51 N. E. 758, 42 L. R. A. 696, 68 Am. St. Rep. 155 (1898); Noel v. People, 187 Ill. 587, 58 N. E. 616, 52 L. R. A. 287, 79 Am. St. Rep. 238 (1900).

of the board of aldermen (Hine v. City of New Haven, 40 Conn. 478); authorizing harbor masters to station vessels and to assign to each its place (Vanderbilt v. Adams, 7 Cow. [N. Y.] 349); forbidding the occupancy of a place on the street for a stand without the permission of the clerk of Faneuil Hall Market (In re Nightingale 11 Pick. [Mass.] 168); forbidding the keeping of swine without a permit in writing from the board of health (Quincy v. Kennard, 151 Mass. 563, 24 N. E. 860); forbidding the erection of any kind of a building without a permit from the commissioners of the town through their clerk (Commissioners v. Covey, 74 Md. 262 [22 Atl. 266]); forbidding any person from remaining within the limits of the market more than twenty minutes unless permitted so to do by the superintendent or his deputy (Com. v. Brooks, 109 Mass. 355)."

In all of these cases the discretion upon which the right depended was not that of a single individual. It was not in all of the cases cited by plaintiff in error, nor was their principle based on that. It was based on the necessity of the regulation of rights by uniform and general laws—a necessity which is no better observed by a discretion in a board of aldermen or council of a city than in a mayor.; and the cases, therefore, are authority against the contention of plaintiff in error. Besides, it is opposed by Davis v. Com., 167 U. S. 43, 17 Sup. Ct. 731, 42 L. Ed. 71.

Davis was convicted of violating an ordinance of the city of Boston by making a public address on the "Common," without obtaining a permit from the mayor. The conviction was sustained by the Supreme Judicial Court of the commonwealth (162 Mass. 510, 39 N. E. 113, 26 L. R. A. 712, 44 Am. St. Rep. 389), and then brought here for review.

The ordinance was objected to, as that in the case at bar is objected to, because it was "in conflict with the Constitution of the United States and the first section of the fourteenth amendment thereof." The ordinance was sustained.

It follows from these views that the judgment of the Supreme Court of Utah should be, and it is, affirmed.[15]

[15] See, also, Gundling v. Chicago, 176 Ill. 340, 52 N. E. 44, 48 L. R. A. 230 (1898) affirmed 177 U. S. 183, 20 Sup. Ct. 633, 44 L. Ed. 725 (1900); Fischer v. St. Louis, 194 U. S. 361, 24 Sup. Ct. 673, 48 L. Ed. 1018 (1904); Freund, Police Power, §§ 639–655.

As to judicial control of administrative discretion in continental jurisprudence, see Grünhut's Zeitschrift für Privat- u. Öffentliches Recht, vol. 18, pp. 148–163; Id., vol. 19, pp. 327–411; Laun, Freies Ermessen, 1910.

CHAPTER III

FORM AND PROOF OF OFFICIAL ACTS[1]

SECTION 11.—ACTION OF OFFICIAL BODIES—THE BODY MUST BE CONVENED

PENNSYLVANIA R. CO. v. MONTGOMERY COUNTY PASS. RY. CO.

(Supreme Court of Pennsylvania, 1895. 167 Pa. 62, 31 Atl. 468, 27 L. R. A. 766, 46 Am. St. Rep. 659.)

WILLIAMS, J.[2] * * * But in this connection another interesting question suggests itself. How is the assent of "the local authorities" to be obtained in any given case, and what is the proper evidence that it has been given? The township books, in the custody of the town clerk, are the records of the township, and should afford evidence of the action taken by the supervisors in all matters of public importance. A paper in the pocket of a contractor or of some officer of a corporation is not the proper evidence of action by the township or the school district. The action needed is not that of the individuals who compose the board, but of the official body. Thus it was held that a contract signed by the members of the school board separately did not bind the district. The best evidence of their official action was their minutes kept by the secretary. Wachob v. School Dist., 8 Phila. 568. For the same reason a contract signed by the president and secretary was held to be invalid. It had not been acted upon by the board when in session. School Dist. v. Padden, 89 Pa. 395.

One supervisor may bind the township by an act that is ministerial in its character. Dull v. Ridgway, 9 Pa. 272; Pottsville Borough v. Norwegian Tp., 14 Pa. 543. Not so, however, when the act is one that requires deliberation and the exercise of judgment. Cooper v. Lampeter Tp., 8 Watts, 125; Union Tp. v. Gibboney, 94 Pa. 534; Som-

[1] As to whether official declaratory acts must be in writing, see Hoke v. Field, 10 Bush (Ky.) 144, 19 Am. Rep. 58 (1873); People v. Murray, 70 N. Y. 521 (1877); Wigmore, on Evidence, § 2427.

As to requirement of personal action of officer, see Chapman v. Inhabitants of Limerick, 56 Me. 390 (1868); Wilcox v. M'Connel, 13 Pet. 498, 512, 10 L. Ed. 264 (1839); Runkle v. U. S., 122 U. S. 543, 7 Sup. Ct. 1141, 30 L. Ed. 1167 (1887).

As to place of action, see Lynde v. Winnebago Co., 16 Wall. 6, 21 L. Ed. 272 (1872).

[2] Only a part of the opinion of Williams, J., is printed.

erset Tp. v. Parson, 105 Pa. 360. In such cases the supervisors must be together, and their action must be taken in their official character, and should appear upon the township book kept by the town clerk. If not so taken, it does not bind the township, and has no validity whatever. The supervisors should consider and deliberate upon any application made to them for leave to occupy any of the township roads with a street railway. If they decide to grant the application upon certain terms and conditions, as to the manner and extent of the occupancy permitted and the extent of repairs to be required, these terms should appear in the record of the meeting, as well as the consent; and a contract that does not rest on such official action, properly taken by the proper officers, is utterly worthless. * * *[3]

SECTION 12.—SAME—ACT OF MAJORITY BINDS BODY

GRINDLEY et al. v. BARKER et al.

(Court of Common Pleas, 1798. 1 Bos. & P. 229.)

EYRE, C. J.[4] The true question in this case lies in a very narrow compass. It is this: What is the operation in law of a judgment of four out of six triers, six being the number constituted to be the triers, and the six being assembled to inquire and try; whether it is to be deemed the finding and judgment of the body, or merely the finding and judgment of the four individuals who concurred? If it is the mere finding of the four who concurred, then this leather is not found insufficient, but if the operation of law on the finding of four, who are the majority of the body, duly assembled, be that their judgment is the judgment of the whole, and therefore the judgment of the triers, then the leather must be taken to have been found insufficient, and the defendants are justified. On the first argument I thought this question

[3] "Without formal action by the [state] board [of health], directing a nuisance, or the cause of any special disease or mortality, to be abated and removed, its secretary can neither speak nor act for it in ordering the abatement and removal of the nuisance, and the disregard of an order so given is not indictable." Com. v. Yost, 197 Pa. 171, 46 Atl. 845 (1900).

See Chicago & N. W. R. Co. v. Dey, 35 Fed. 866, 883, 1 L. R. A. 744 (1888). "An official board acts through its secretary. This complainant with others addressed an official communication to the board. He received an answer in the regular way—one signed by the secretary as secretary. Equity and good faith forbid going behind such official notification."

So, under circumstances, acquiescense and assent may be evidenced by inaction or conduct; i. e., informally. Bartlett v. Boston, 182 Mass. 460, 65 N. E. 827 (1903); State v. Rohart, 83 Minn. 257, 86 N. W. 93, 333, 54 L. R. A. 947 (1901).

[4] Only a portion of the opinion of Eyre, C. J., is printed.

would turn on two general heads of inquiry: First, what the general rule of law was in the case of bodies of men intrusted with powers of this nature; whether they must all concur, or whether the decision of the majority would bind the whole? Secondly, supposing the latter to be the general rule, whether that general rule is to be controlled by the intent of the legislature as collected from the scope and provisions of this act?

With respect to the first question, I think it is now pretty well established that where a number of persons are intrusted with powers not of mere private confidence, but in some respects of a general nature, and all of them are regularly assembled, the majority will conclude the minority, and their act will be the act of the whole. The cases of corporations go further. There it is not necessary that the whole number should meet; it is enough if notice be given; and a majority, or a lesser number, according as the charter may be, may meet, and when they have met they become just as competent to decide as if the whole had met.[5] With a view to this case, those who have met resemble the six triers who have authority to decide: and then a question arises, how they may act when they have met. The case in Atkyns [6] shows the opinion of a great judge, Lord Hardwicke, who was much conversant with this subject in one part of his judicial life, that the majority of persons assembled will conclude the minority, and an act done by them will be the act of the whole body. And that part of the law of corporations applies to this case; that with regard to powers not merely private, which are to be exercised by many persons, provided a sufficient number be assembled, the act of the majority concludes the minority, and becomes the act of the whole body. * * * If that be so, the argument drawn from the word "triers" being used generally, in the thirty-third and forty-sixth sections, will not stand much in our way; because the judgment of four triers in this case is the judgment of all, as much as if all had concurred. There is nothing, then, in the general rule of law to prevent this finding from being held good. * * * [7]

[5] On this point see Throop, Public Officers, § 112.

[6] Attorney General v. Davy, 2 Atk. 212 (1741).

[7] The discussion of the second question is omitted.

"It cannot be disputed that, wherever a certain number are incorporated, a major part of them may do any corporate act; so if all are summoned, and part appear, a major part of those that appear may do a corporate act, though nothing be mentioned in the charter of the major part." Lord Hardwicke, in Attorney General v. Davy, 2 Atk. 212 (1741).

"It is a well-established rule that, in order to constitute a good corporate assembly in the case of a corporation consisting of a definite and an indefinite body, there must be present a majority of that number of which the definite body consists, although, it is not necessary that there should be a majority of the indefinite body." Blacket v. Blizard, 9 Barn. & C. 851, 860 (1829).

See, also, Martin v. Lemon, 26 Conn. 192 (1857).

"The rule of the common law, which is now declared by statute, that where an authority is to be exercised by more than one officer they must all concur in its exercise, or all meet and consult and a majority agree to the act, is subject to the necessary qualification that, if one is notified to attend

SECTION 13.—SAME—PRESUMPTION THAT ALL MET OR WERE NOTIFIED

McCOY v. CURTICE.

(Supreme Court of Judicature of New York, 1832. 9 Wend. 17, 24 Am. Dec. 113.)

Trover. Defendant justified as collector under a warrant signed by two trustees of a school district.

SUTHERLAND, J.[8] * * * The next objection was to the introduction of the warrant, on the ground that it was signed only by two trustees. I am inclined to think the objection was properly overruled. Where power is delegated to two or more individuals for a mere private purpose, in no respect affecting the public it is necessary that all should join in the execution of it. Thus arbitrators must all unite in an award. But in matters of a public concern, if all are present, the majority can act, and their acts will be the acts of the whole. 1 Bos. & Pull. 236; 3 T. R. 592; Green v. Miller, 6 Johns. 41, 5 Am. Dec. 184. There can be no doubt that a contract made by all of the trustees and signed by two would be binding, or that two could contract against the will of the third, if he was duly notified or consulted and refused to act. The convenient dispatch of public business requires that it should be so. Ex parte Rogers, 7 Cow. 526, and cases there cited.

The objection here was simply that the warrant was not signed by all the trustees. There is nothing to show, or from which it is to be inferred, that all the trustees did not concur and act in the previous proceedings, and assent to the issuing of the warrant. In Yates v. Russell, 17 Johns. 468, which was a writ of error upon a judgment entered upon the report of referees, in an action not referable under the statute, the report was signed by only two of the referees, and one of the errors relied upon was that it did not appear that all the referees met and heard the parties. It was held by Chancellor Kent, who delivered the opinion in the Court of Errors, that it was to be presumed that all the referees met, as nothing appeared to the contrary; and if they did not, the objection should have been taken in the court below. That principle seems to be applicable to this case and disposes of this point.

Judgment affirmed, with double costs.

and refuses, it is the same as if he had attended and dissented from the act." Horton v. Garrison, 23 Barb. (N. Y.) 176, 179 (1856).

See, also, Williams v. School District, 21 Pick. (Mass.) 75, 82, 32 Am. Dec. 243 (1838), "if there be a quorum."

See Wilson v. Alabama Gt. Southern R. Co., 77 Miss. 714, 28 South. 567, 52 L. R. A. 357, 78 Am. St. Rep. 543 (1900).

[8] For first part of opinion, see post, p. 107.

GALBRAITH v. LITTIECH.

(Supreme Court of Illinois, 1874. 73 Ill. 209.)

Mr. Chief Justice WALKER delivered the opinion of the court.

This suit was brought by appellee, as supervisor of roads in Henderson county, before a justice of the peace, to recover a penalty from appellant for obstructing a public highway. A trial was had before the justice, and resulted in a recovery of one dollar and costs. An appeal was prosecuted to the circuit court, and a change of venue was had from that county to the Mercer circuit court. A trial was there had, resulting as it did before the justice of the peace. A motion for a new trial was entered, but overruled by the court, and the case is appealed to this court.

All the grounds urged for a new trial are of the most technical character. It is first insisted that but two of the viewers appointed by the county commissioners acted in laying out the road, and it is therefore illegal. Appellant concedes that, had all acted, the concurrence of the two would have answered the requirements of the law. Whether all three joined in the report, still we must presume that all three did act, although but two signed the report.

In the cases of Nealy v. Brown, 1 Gilman, 10, Ferris v. Ward, 4 Gilman, 499, and Dumoss v. Francis, 15 Ill. 543, it was held that on presenting the order of the county commissioners establishing the road, it would be presumed, until disproved, that all the antecedent steps required by the statute had been taken. In this case the order establishing the road was introduced, and also the report signed by two of the viewers. It did not state that the other failed or refused to act with them, and, failing to state that fact, we must presume that he was present and so acted—nor can the presumption as to that fact be overcome by parol evidence. We will presume that the county commissioners heard evidence, that the other commissioner acted, but failed to join in the report, and the presumption is not contradicted by the record. This is a complete answer to that objection. * * *[9]

[9] The rest of the opinion is omitted.

See Wigmore on Evidence, § 2534.

But see Wilson v. Alabama Great Southern Railroad Company, 77 Miss. 714, 28 South. 567, 52 L. R. A. 357, 78 Am. St. Rep. 543 (1900): "The presence of all three members of the executive committee of the state board of health was necessary to a valid order on September 15, 1897, when the order in question was made. Laws 1894, p. 33, c. 38. This is made clear as the legislative purpose by the amendment (Laws 1898, p. 93, § 2), providing, for the first time, that 'the presence of two members of the executive committee' would do thereafter. The order in question was made by only two members; it not being shown that three were present. * * * Had three been present, and two made the order, this objection would have been obviated."

See, also, 1 Rev. St. N. Y. (1st Ed.) pt. 1, c. 16, tit. 1, § 125: "Any two commissioners of highways of any town may make any order, in execution of the powers conferred in this title; provided it shall appear in the order filed by them that all the commissioners of highways of the town met and

SECTION 14.—EVIDENCE OF OFFICIAL ACTION—ON DIRECT ATTACK

GILBERT v. COLUMBIA TURNPIKE CO.

(Supreme Court of Judicature of New York, 1802. 3 Johns. Cas. 107.)

Application by E. Gilbert to set aside an inquisition found by three commissioners appointed under the second section of the act amending the act establishing the Columbia Turnpike Company, passed March 28, 1800.

PER CURIAM. This is the case of a special power granted by statute, and affecting the property of individuals, which ought to be strictly pursued, and appear to be pursued, on the face of the proceedings. 4 Burr. 2244; Cowp. 26; 1 Burr. 377; 7 Term Rep. 363. This is an established rule, and it is important that it should be maintained, especially in cases which so materially interfere with private rights. It does not appear that any disagreement existed between the parties, or that in consequence of any disagreement the company applied to a judge, both of which were requisite, to authorize the appointment of commissioners. The disagreement, and consequent application, were the foundation of the whole proceedings, and without them the judge could have no jurisdiction in the case. As they do not appear, we are not to intend they existed.

The judge, in the case before us, is required by the act to have no interest in the road; and it is also required that the commissioners shall not be inhabitants of any of the towns through which the road shall pass. Neither of these points, which are essential to an impartial result, appear to have been complied with, and both are indispensable.

A notice to the owners, it is true, is alleged to have been given, but it is not stated to have been in writing. A notice, in legal proceedings, means a written notice, and we think the act itself, in this instance, contemplates such a notice. In certain cases, it directs the notice to be left at the dwelling house of the party. This must intend a written notice.

On these grounds without determining the other objections, we are clearly of opinion that the inquisition ought to be set aside.

deliberated on the subject embraced in such order, or were duly notified to attend a meeting of the commissioners for the purpose of deliberating thereon."

See People v. Williams, 36 N. Y. 441 (1867).

HARBAUGH et al. v. MARTIN.

(Supreme Court of Michigan, 1874. 30 Mich. 234.)

COOLEY, J.[10] Certiorari is sued out in this case to reverse the proceedings of the drain commissioner in assessing upon the plaintiffs in error and others the expense of deepening and widening the Prairie Ronde ditch, in the township of Springwells. The proceedings purport to have been had under chapter 47, p. 570, of the Compiled Laws of 1871, the fourth section of which requires the county drain commissioner, upon the application to him in writing of ten or more owners of land in each township in or through which they ask to have a drain constructed, to institute proceedings for that purpose, with a proviso, however, that "the petition, except when the same is asked for upon sanitary reasons only, shall be signed by a majority of the resident owners of the lands through or into which said drain is proposed to be constructed." The petition in this case did not ask action upon sanitary reasons. It was signed by twenty-one persons, who style themselves "citizens and freeholders of Springwells"; but there is no finding in the case, nor even any recital in any of the papers which make up the record of the proceedings, that these twenty-one persons constitute a majority of the resident owners of the lands through or into which the drain was constructed. A subsequent paper presented to the commissioner as a waiver of a jury to assess damages, etc., is signed by nearly all the same persons, with some others, who are therein recited to be "a majority of the resident owners of the property affected by the said drain"; but this cannot aid the petition, for other property is usually affected by a drain besides that into or through which it extends.

It is said, however, that the commissioner in these cases may act upon his own knowledge of the facts. If that be admissible, which we do not decide, the record must in some manner show that he possessed the requisite knowledge to justify his action. The record cannot be aided by knowledge which the commissioner conceals in his own breast; it must be complete in itself, and all jurisdictional facts must appear on the face of it. In this case nothing appears to show that the petition was sufficiently signed until the commissioner makes return to this court. But assertions in that cannot cure defects in his record. People v. Highway Commissioners, 14 Mich. 528. * * *

The proceedings must be quashed.[11]

[10] Only a portion of the opinion is printed.

[11] See, also, McGregor v. Supervisors, 37 Mich. 388.

"In a proceeding to establish or vacate highways in this state the statutes have uniformly required that the petitions should be signed by twelve freeholders of the county, six of whom shall reside in the immediate neighborhood of the highway proposed to be located or vacated (section 7649, Burns' Ann. St. 1908); but it has been held that it was not necessary to the sufficiency of the petition that said facts be alleged therein [citing authorities]. Any-

MEEKER v. VAN RENSSELAER.

(Supreme Court of Judicature of New York, 1836. 15 Wend. 397.)

The declaration charged the defendant with pulling down five dwelling houses. * * * The defendant proved that the board of health of the city had directed the nuisance to be abated. To this proof the plaintiff objected, insisting that the minutes of the board or written evidence of their orders should be produced. The objection was overruled, and parol evidence was received. * * *

SAVAGE, C. J.[12] * * * It was objected that parol evidence should not have been received of the orders of the board of health. This objection was well taken. The board of health is a tribunal created by statute, clothed with large discretionary powers; and, being a public body, its acts should be proved by the highest and best evidences which the nature of the case admits of. Every proceeding of a judicial character must be in writing. It is not to be presumed that minutes of their proceedings are not kept by such a body, and that determinations which seriously affect the property of individuals, were not reduced to writing, but rest in parol. In the case of Van Wormer v. City of Albany, 15 Wend. 262, the minutes of the proceedings of the board were incorporated with the proceedings of the corporation, of which the board of health were members, and were proved by a witness a member of both boards. * * *

WHITELY v. PLATTE COUNTY.

(Supreme Court of Missouri, 1880. 73 Mo. 30.)

NORTON, J. The controversy in this case grows out of the action of the township board of directors of Weston township, Platte county, in locating a new road over the land of plaintiff in said township. Plaintiff appealed from the action of said board to the county court of said county, in which court he filed his motion to set aside the order establishing said road, because it was made without notice to plaintiff, and because the said board had no jurisdiction to make it. The court overruled the motion, whereupon the plaintiff appealed to the circuit court, and renewed his motion to set aside said order because the township board had acquired no jurisdiction to establish said road, and because the order establishing it was made without notice to him. This motion being overruled, plaintiff appeals to this court.

The only question which the record presents is whether or not the township board in the various steps taken had acquired jurisdiction. This being a statutory proceeding in invitum to appropriate to the use

thing in Conaway v. Ascherman, 94 Ind. 187, 190, to the contrary is overruled." Ætna Life Ins. Co. v. Jones (Ind.) 89 N. E. 871 (1909).

[12] Only a portion of this case is printed.

of the public the land of plaintiff, and being in derogation of common law and common right, "the utmost strictness is required in order to give it validity; and unless upon the face of the proceeding it affirmatively appear that every essential prerequisite of the statute conferring the authority has been fully complied with, every step, from inception to termination, is coram non judice." Ells v. Pacific R. R., 51 Mo. 200. The township board could only acquire jurisdiction to lay out a new road and assess damages as is provided in sections 24, 25 and 27, p. 110, of the act of 1873, that being the act under which the proceeding was had. These sections are as follows:

24. "The township board of directors may lay out or discontinue or alter any road, or lay out any new road, when petitioned for by any number of legal voters, who shall be householders of said township, not less than twelve, residing within three miles of the road so to be altered, discontinued or laid out; said petition shall set forth in writing a description of the road and what part is to be altered or discontinued; and if for a new road, the names of owners of land, if known, over which the road is to pass, the point at which it is to commence, its general course, and the place at or near which it is to terminate."

25. "Whenever any number of legal voters determine to petition the township board for the alteration or discontinuance of any road, or laying out a new road, they shall cause a copy of their petition to be posted up in three of the most public places in the township, at least twenty days before any action shall be had in reference to said petition."

27. "The damages sustained in consequence of the laying out, opening or altering a road, when the parties interested therein cannot agree, shall be ascertained and assessed by the township board."

It is clear from these statutory provisions that it is an indispensable prerequisite to laying out a new road that the petition for the same must be made by twelve legal voters and householders of the township living within three miles of the proposed road, and that a copy of such petition must be posted in three of the most public places in the township at least twenty days before any action can be taken in reference to it. These facts are jurisdictional and must affirmatively appear in the proceedings, and unless they do so appear no jurisdiction is conferred, and none can be exercised. The object of requiring a copy of the petition to be posted up was to impart notice to the landowner that the public proposed to make an appropriation of his property to a public use, and completely deprive and divest him of all control over the same; and in order that such notice might be effectual, it is not only provided that such copy shall be posted up in three places in the township where the road is proposed to be established, but that these places must be three of the most public places in the township. The record before us entirely fails to show a compliance with the law in these respects, it only appearing therefrom "that it was proved to the satisfaction of the board that notice of the opening of said road had

been posted in three places along the line of the road for twenty days previous to this date." Neither does it appear from the face of the petition, or any other part of the record, that the road was petitioned for by twelve legal voters and householders of the township living within three miles of the road. The persons signing the petition are designated as citizens of Weston township.

It therefore follows that, as the facts necessary to confer jurisdiction on the township board do not affirmatively appear, under the rulings of this court in the case of Ells v. Pacific R. R., supra, and the case of Carpenter v. Grisham, 59 Mo. 247, the judgment must be reversed and the cause remanded to be disposed of in conformity with this opinion. All concur.

SECTION 15.—Same—IN ENFORCEMENT PROCEEDINGS.

PEOPLE ex rel. GREENWOOD et al., Highway Com'rs, v. BOARD OF SUPERVISORS OF MADISON COUNTY.

(Supreme Court of Illinois, 1888. 125 Ill. 334, 17 N. E. 802.)

Appeal from Appellate Court, Fourth district.

Proceeding by mandamus by Peter Greenwood, J. M. Kendall, and John T. Brown, Highway Commissioners of the Town of Wood River, against the Board of Supervisors of Madison County, to compel an appropriation of one-half of the cost of building a bridge in the town of Wood River. Mandamus denied, and relators appeal.

SHOPE, J.[13] * * * The main controversy, however, arises upon the instruction given by the court directing a verdict for the defendant. As the case stood at the time the instruction was given, it was entirely competent for the court, and correct practice, to direct a verdict for the defendant, for the reason that there was not before the jury sufficient evidence to support a verdict for the relators. But back of this instruction lay the action of the court in rejecting the evidence offered by the relators. If the offered evidence was competent, and tended to sustain the issues on behalf of the relators, its rejection was erroneous, and the instruction improperly given.

Under the practice prevailing prior to the present statute relating to mandamus, the alternative writ became the foundation of all subsequent proceedings in the case, answering the same purposes as the declaration in ordinary actions. This being so, it was necessary that the alternative writ should show upon its face a clear right in the relator to the relief demanded. Therein the relator was required to distinctly set forth all the material facts on which he relied, so

[13] Parts of this case are omitted.

that the same could be admitted or traversed. Trustees v. People, 12 Ill. 248, 52 Am. Dec. 488. The statute referred to (Starr & C. Ann. St. 1896, p. 1584), while it has changed the practice, dispensing with the issuance of the alternative writ, and requiring the defendant to answer, plead, or demur to the petition, has not modified or dispensed with the common-law requirement resting upon the relator to set forth and show a clear and indubitable right to the relief demanded. In every case, to entitle the relator to relief, it must appear that the defendant is under a legal obligation to do and perform the act required, and every material fact necessary to show such legal duty must be averred in the petition. Hall v. People, 57 Ill. 307; People v. City of Elgin, 66 Ill. 507; People v. Village of Crotty, 93 Ill. 180.

The act in relation to roads and bridges under township organization, approved May 28, 1879, and in force July 1, 1879 (Laws 1879, p. 257), is broad and comprehensive in its terms and provisions, embracing within its scope the establishment, alteration, construction, repair, maintenance, and supervision of roads and bridges within organized towns. The immediate control and supervision of roads and bridges in a town was vested in three commissioners of highways, who were required to meet at a designated time and place, and to organize by choosing one of their number treasurer, and thereafter to fix their own time and place of meeting; and, by the thirteenth section of the act, the commissioners were required to "keep a correct record of their proceedings at all meetings." Although reference is here made to the particular act named, in prior as also in subsequent acts similar provisions appear, and like powers were vested in, and duties imposed upon, these boards of highway commissioners; and they are now, and were under this particular act, regarded and held to be a quasi corporation, powerless to act except together and as a body (Commissioners v. Baumgarten, 41 Ill. 254; McManus v. McDonough, 107 Ill. 95), and of which action, as we have seen under the act of 1879, they were required to "keep a correct record." It seems clear that the same rules of law are to be applied to this corporate body, in respect to its corporate action, and the evidence of such action, as are applied to other municipal corporations; and that the record of its action, required by law to be made and kept, becomes the best, and, if in existence and capable of being produced, the only evidence thereof.

The 110th section of the act of 1879 provided under what circumstances a moiety of the expense of the construction of a bridge in any town might be borne by the county. To avail of such county aid, and as the basis of any action to that end by the county authorities, it must appear (1) that a necessity existed for the construction or repair of such bridge; (2) its construction or repair must be an unreasonable burden on the town; (3) the cost must exceed such sum as could be raised in one year by ordinary taxation for bridge pur-

poses in the town; and (4) that one-half the necessary funds therefor had been provided by the town. These facts are by the law made jurisdictional; and, without their existence and concurrence, the county board was without power to appropriate money from the county treasury for the purpose stated. The determination of these jurisdictional facts is by the act left to the commissioners of highways. Acting, as alone they had the power to act, together and as a board, at a meeting of the board, they were to determine that the construction or repair of a bridge within their territorial jurisdiction was necessary; that its construction or repair would be an unreasonable burden on the town; that the cost thereof would exceed the sum that could have been raised in one year by ordinary taxation for bridge purposes in the town; and that they, by means under their control, had provided for one-half the necessary expense—of which determination they were required by the act to make and keep a record. And this same section of the act (section 110) made it the imperative duty of the county board, whenever the commissioners of highways of a town brought themselves within the provisions of the act, to appropriate out of the county treasury one-half the cost of the proposed construction or repair. In the case under consideration, the commissioners of highways of Wood River township sought to avail of the provisions of the act referred to; and, if the case made by their petition and proofs was such as to bring them within the law, the writ should have been awarded.

By the averments of relators' petition a prima facie case was made. Issue being taken thereon, it became necessary for relators to maintain, by competent testimony, the truth of every material averment; taking upon themselves the same burden that rests upon the plaintiff in an ordinary action at law where the averments of the declaration are put in issue. To meet this requirement the relators produced as a witness the town clerk of Wood River, who was also the clerk of the commissioners of highways for the year 1882, who testified that the commissioners held meetings on April 19, August 19, and September 2, 1882; and, on his being asked if the commissioners of highways of the town did not determine to build a bridge, an objection was interposed by the defendants, and sustained by the court. This ruling of the circuit court was unquestionably correct. As we have before stated, the determination by the commissioners of highways that a necessity existed for the construction or repair of a bridge, as a basis for an application to the county board for county aid under the statute, was an exercise of a corporate power vested in the commissioners of highways, which could only be at a meeting of the commissioners, and be shown by the record required by the law to be made and kept. Before the county board could be legally moved in the matter, or any legal duty be cast upon them, the commissioners must have determined that such necessity existed, and have preserved

the evidence of that fact in their record. In the proceeding then before the circuit court, the corporation, the commissioners of highways, could only speak by their record, unaided by parol testimony.

The principles announced seem to be well supported by authority. Where the law requires records to be kept, they are the only lawful evidence of the action to which they refer, and such record cannot be contradicted or supplemented by parol. The whole policy of the law would be defeated if they could rest partly in writing and partly in parol. Stevenson v. Bay City, 26 Mich. 44; Hall v. People, 21 Mich. 456; Morrison v. City of Lawrence, 98 Mass. 219; Hunneman v. Fire Dist., 37 Vt. 40; Mayhew v. District of Gay Head, 13 Allen (Mass.) 129. So, where county commissioners and township trustees were required by law to keep a true record of their proceedings, it was held that they could "only speak by their record" when legally assembled. Commissioners v. Chitwood, 8 Ind. 504. And, where school districts are required by law to keep an account of their proceedings by a sworn clerk, such proceedings can only be proved by the record. Offered parol proof was rejected. Jordan v. School Dist., 38 Me. 164. And in respect of the county court in counties not under township organization, constituting in such counties the county board, having the management and control of the fiscal affairs of the county, it was held that, in matters of allowance or rejection of claims against the county, the records of the court are the only admissible evidence of their official acts. McHaney v. Marion Co., 77 Ill. 488.

The relators read in evidence the record of the commissioners of highways of August 19, 1882, as follows: "The amount of taxes was fixed at forty (40) cents for bridges, and twenty (20) cents for roads; for making and repairing bridges, $6,000.40; for other purposes, $2,-100.01; total, $8,100.41. Moved to petition county for aid in building bridge over Wood river. Carried." And offered, in that connection, to prove by their clerk that, at the meeting on August 19th, it was determined to build the particular bridge; that it was necessary it should be built; that its construction would be an unreasonable burden on the township; that a tax was levied by the commissioners for the purpose of providing one-half the estimated cost thereof; that the estimated cost was $5,000; and that the memorandum on the records was the result of the determination and action of the commissioners. The court sustained an objection to the offered testimony. The offered testimony was in the highest sense material; and, had it been embodied in the record of the commissioners, it would have tended to establish every material averment of the petition. But the imperfect record of the determination and action of the commissioners could not thus be cured and aided by parol. Considerations of the gravest character require us to hold that, where the law has required a record to be kept of corporate action by any of the agencies of the state, the record alone can be resorted to to establish such action in all collateral proceedings.

Further offers of proof were made by relators in respect to the estimate by the commissioners of the sum needed for making and repairing bridges for the year 1882, including one-half the cost of this new bridge; that an estimate of the cost of this bridge was procured from the county surveyor, of which, however, no record was made: of the rate per cent. of the levy for bridge purposes; of the amount collected and turned over to the commissioners, and what part of it was for this new bridge,—to all of which objection was sustained. As will be seen, every material fact offered to be proved by parol should have appeared in the record of the action of the commissioners, or was capable of proof by the public records of the county, and the ruling of the circuit court was correct.

Relators did read in evidence their petition to the county board asking for county aid, and also the record of the action of the county board thereon, from which it appeared an allowance from the county treasury was made of $1,000. The fact that the county board was petitioned for county aid might, no doubt, be shown by the petition itself; but such petition, though made and signed by the commissioners, cannot be regarded as proof of the facts recited therein, so as to supply the absence or take the place of the record of the commissioners' action required by the law to be kept. * * *

Perceiving no error in the judgment of the Appellate Court, it is affirmed.[14]

SECTION 16.—SAME—IN COLLATERAL PROCEEDINGS

NEALY v. BROWN et al., County Com'rs.

(Supreme Court of Illinois, 1844. 1 Gilman, 10.)

Debt on the statute for obstructing a public highway. The cause was heard in the Greene circuit court, before Hon. Samuel D. Lockwood and a jury, at the October term, 1843; the venue having been changed from Jersey county. The jury found a verdict against the defendant below, and a fine of $20 was imposed, from which judgment he prosecutes his writ of error in this court.

CATON, J. This was an action of debt for obstructing a public highway, commenced before a justice of the peace of Jersey county, and appealed to the circuit court of that county, whence the venue was

[14] As to defective and erroneous records, see Dillon, Municipal Corporations, §§ 295–301; also State ex rel. Brickman v. Wilson, 123 Ala. 259, 26 South. 482, 45 L. R. A. 772 (1899). That a record cannot be allowed to be amended to the prejudice of a party who relied upon action as it appeared on the record, see Sawyer v. Railroad, 62 N. H. 135, 13 Am. St. Rep. 541 (1882); Bissell v. Jeffersonville, 24 How. 287, 16 L. Ed. 664 (1860).

There are many statutory provisions relating to presumption of regularity, especially in highway proceedings and tax sales.

changed to the circuit court of the county of Greene. The record presents two bills of exceptions, from the first of which it appears that, upon the trial of the cause, the plaintiffs below offered in evidence a certified copy of an order of the county commissioners' court of Jersey county, which refers to and adopts the report of the viewers appointed to view and locate the road for the obstruction of which this suit was brought, and establishes said road as a public highway, and directs that the same be opened and kept in repair according to law. To this the defendant objected, but the court allowed it to be read, and this we will first examine.

Was it necessary, before it was competent to read this order, to show that all the previous steps required by the statute had been taken? We think not. The county commissioners are vested with exclusive jurisdiction over all matters in relation to roads in their respective counties, and we are satisfied that sound policy and the public good require that we should presume that the antecedent proceedings had been regular, subject, however, to be rebutted by the other party. If we go behind the order, I know not where we might stop. Should the plaintiff show that a petition was presented, signed by the requisite number of persons, and should he be required to prove that all were legal voters, that the viewers were qualified to act as such, and were sworn, and all the other minute inquiries which ingenuity could invent? Should such be held to be the law, we should be drawn into the trial of a great number of collateral issues in no wise important to the justice of the case. Should such a rule be adopted, most, if not all, of the public roads in the older counties might be shut up tomorrow with impunity.

In the case of Eyman v. People,[15] decided at the September term, 1842, 1 Gilman, 8, this court went farther than we are now called upon to go. There it was held that it was not necessary to produce any record evidence of the road. In that case the court say: "It is insisted that the original survey and plat of the road, and the records of the commissioners' court approving the same, and directing the road to be opened, should have been produced as the best evidence that it was a public road. No authority has been cited, nor are we aware of any adjudicated case sustaining this position. The practice would be very inconvenient, and would tend rather to defeat than promote the ends of justice. If the road is used and traveled by the public as a highway, and is recognized and kept in repair as such by the county commissioners and supervisor, whose duty it is by law to open and repair public roads, proof of these facts furnishes a legal presumption, liable to be rebutted, that such road is a public highway."

The laying out and opening of roads is not an exercise of judicial powers, and hence the position that no presumptions are to be indulged in their favor is not tenable. As well might he, who is affirming the

[15] Indictment of county commissioners for omission of duty in neglecting to cause repairs to be made.

sale of school land, be required to show that a petition for the sale of the land had been presented by the requisite number of householders of the township. * * *[16]

STATE v. WEIMER.

(Supreme Court of Iowa, 1884. 64 Iowa, 243, 20 N. W. 171.)

Appeal from Lee district court.

Defendant was convicted of obstructing a highway, and now appeals to this court.

BECK, J. The only evidence introduced by the state to prove that the road, for the obstructing of which defendant was indicted, is a lawfully established highway, consists of the commissioners' road record, a book in the custody of the auditor of the county, and an official copy of the original plat of the road. There was evidence tending to show that the road indicated by these records had been opened, and afterwards obstructed by defendant.

The road record fails to show that the notice required by the statute (Code, § 936) had been given, and there is no recitation or averment therein tending to show that any notice was given to defendant upon whose land, it appears to be claimed, the road was located. Nor does the record show that defendant appeared in the proceeding, and thus waived service of notice. It is recited that the road was "by consent of attorneys of parties herein, and request of board, declared to be forty feet in width." But it is not shown by the record, nor by evidence aliunde, if, indeed, it were competent, which we do not determine, that defendant appeared to the proceedings, or had notice thereof at any time, or that he was a party to the case before the supervisors. The defendant proposed to prove that, by an agreement between the board of supervisors and himself, the road was to be established as of the width of thirty-three feet. But, upon the objection of the state, this evidence was rejected. There was no evidence of any character tending to show that defendant was served with the notice required by law, or waived service thereof.

This court has held in a similar case that, as the petition and notice required by law in proceedings to establish roads are necessary to confer jurisdiction upon the supervisors in road cases, they must be shown by the record, and that, in the absence of such showing, no presumption will obtain in support of the jurisdiction of the supervisors. State v. Berry, 12 Iowa, 58. There being no evidence that the supervisors acquired jurisdiction to establish the road in this case, and no presumption thereof authorized by law, the proceedings are void. Alcott v. Acheson, 49 Iowa, 569.

[16] The rest of the opinion is omitted. It is stated in the further course of the opinion that from the record it does not appear that any evidence was given tending to establish that the road obstructed was on defendant's land.

We understand that the court below, in the second instruction, held that the records of the supervisors conclusively prove that the highway was lawfully established. The instruction, in the form we find it in the abstract, is not clearly expressed, but it certainly recognizes the sufficiency of the record to show that the road was a lawful highway. The instruction is erroneous. On the contrary, the jury should have been informed that the evidence failed to show that the road obstructed by defendant was established by law. As these considerations are decisive of the case, other questions argued by counsel need not be considered.

The judgment of the district court is reversed.[17]

LINGO v. BURFORD.

(Supreme Court of Missouri, 1892. 112 Mo. 149, 20 S. W. 459.)

GANTT, J. This is a proceeding by injunction, commenced in the circuit court of Johnson county, by which the plaintiff sought to restrain the defendant, Burford, as road overseer, from opening a public road over and through lands of the plaintiff, under an order of the county court.

The material averments of the petition are that "no legal notice was ever given of the presentation of a petition for such an order; that the county commissioner did not survey, view, or mark out a roadway over said land, or take relinquishments of right of way for same, or ask for such relinquishments, or make any report of his action, as the law requires, and that plaintiff has never in fact relinquished the right of way for a road over said land; that there has never been any assessment of damages to be done the land of the plaintiff by the establishment of said road; that the pretended order of record establishing said road is void upon its face, for want of jurisdiction to make the same."

The plaintiff, to sustain his case, introduced the record of the proceedings in the county court. The petition on its face alleged that the petitioners were freeholders of Chilhowie and Post Oak townships, through which said proposed road ran; that it was signed by at least 12 freeholders of said township, and it specified the proposed beginning, course, and termination, with not less than two points named on the direction. Section 7796, Rev. St. 1889. It was presented and publicly read at the regular August term of the county court, 1887.

The record made by the county court at that term is as follows: "Now, at this day, is presented to the court the petition of A. J. Dun-

[17] "The order of revocation was introduced without objection; but, if it contained no statement showing a jurisdiction in the board, it certainly was insufficient for that purpose; and it contains nothing which indicates, that they proceeded under a written complaint." State v. Lamos, 26 Me. 258 (1846), post, p. 183.

See Little v. Denn, 34 N. Y. 452 (1866).

ham et al., praying for the establishment of a public road forty feet in width in Chilhowie and Post Oak townships, to run as follows: [Here follows a minute description of the route.] And the court having heard said petition publicly read, and it being proven to the satisfaction of the court that it is signed by at least twelve freeholders of Chilhowie and Post Oak townships, three of whom are of the immediate neighborhood of said proposed road, and that due notice has been given according to law, and that said proposed road is of public utility and practicability, it is ordered that the county commissioner proceed to view, survey, and mark out said road, and report the practicability of said road, together with the distances and situation of the ground, the names of the parties granting the right of way, and the estimated cost of building needed bridges, at the next regular term of this court."

At the next November term, the county road commissioner filed his report, showing the landowners who had relinquished the right of way and those who had not. Among those who had failed or refused to relinquish, he reported the plaintiff, H. J. Lingo, and that he claimed $100. Thereupon the county court, as required by section 7799, Rev. St. 1889 (section 8, p. 247, Laws 1887), by its order of record, appointed three disinterested freeholders to act as a jury, view the premises, and assess the damages of those who had failed or refused to relinquish the right of way. At the next February term, the commissioners thus appointed made their report, in which they returned that they had viewed the premises, and assessed the damages of each tract of land separately, and the report as to the plaintiff was as follows: "To H. J. Lingo, at end N. E. N. E. section 26, township 44, and range 26—no damages."

Thereupon the court made the following order: "Now, at this day is taken up the report of the commissioners heretofore appointed to assess the damages resulting to the premises of L. P. Fisher, H. J. Lingo, and others, by reason of the establishment of a public road petitioned for by A. J. Dunham et al., from which the court finds that said commissioners have viewed the premises of the parties aforesaid, and have allowed no damages; and no objections being filed to the verdict of said jury, and it appearing to the court that said proposed road is of sufficient utility to justify opening and improving the same for public travel, it is therefore ordered that a public road forty feet in width be opened, and run as follows: [Describing the route particularly.]"

The circuit court granted a perpetual injunction against the road overseer, from which he appeals to this court.

The contention arises as to the jurisdiction of the county court to order the road opened. Plaintiff in error insists that the record of recital of the county court "that due notice has been given according to law," nothing further appearing, was sufficient in this collateral proceeding to show jurisdiction in that court, so far as it was es-

sential to show notice, whereas defendant in error maintains that the recital is insufficient.

That the county court was only authorized to entertain the proceeding to condemn plaintiff's land for the road, upon notice given as required by the statute (section 7797),* is not to be questioned, but it is a well-settled principle that, where the jurisdiction of an inferior court depends upon a fact which said court is required to ascertain and settle by its decision, its decision is conclusive as against a collateral attack. Jackson v. State, 104 Ind. 516, 3 N. E. 863; In re Grove Street, 61 Cal. 438; People v. Hagar, 52 Cal. 171; Shawhan v. Loffer, 24 Iowa, 217; Porter v. Purdy, 29 N. Y. 106, 86 Am. Dec. 283; Lewis, Em. Dom. § 605; Black, Judgm. § 288; Elliott, Roads & S. p. 243; State v. Smith, 105 Mo. 6, 16 S. W. 1052.

The county court had original exclusive jurisdiction to hear and determine, upon a proper petition and due notice, whether a new public road should be established over the route designated in the petition. The petition stated every fact necessary to give the court jurisdiction of the subject-matter. Twenty days' notice of this application was required. The statute required "proof of notice having been given as required." The county court was the tribunal authorized to hear and determine the sufficiency of the proof. It was not required by law to spread on its record the evidence by which it ascertained that notice had been given. It did find and spread on its record that "notice had been given according to law." This was a fact in pais, to be established by evidence, and its power to proceed further in the case depended upon the giving or failure to give this notice. It judicially ascertained it was given, and we think that it is conclusive as against a collateral attack.

In Daugherty v. Brown, 91 Mo. 26, 3 S. W. 210, a case in all respects similar to this, this court held a recital that "due legal notice had been given of the intended application" was sufficient, and affirmed the judgment of the circuit court, refusing to enjoin the overseers from opening the road. The decision in that case is well sustained by authority elsewhere. Hendrick v. Whittemore, 105 Mass. 23; Borden v. State, 11 Ark. 519, 44 Am. Dec. 217; Delaney v. Gault, 30 Pa. 63. * * *[18]

* Rev. St. 1889, § 7797, provides that notice of an intended application for a new road or change of road "shall be given by printed or written handbills put up in three or more public places in such municipal township or townships, one of which to be put up at the proposed beginning, and one at the proposed termination, of said road, at least twenty days before the first day of a regular term of the county court at which the petition is presented, and which notice shall apply and be binding on corporations as well as on persons."

[18] The rest of the opinion is omitted.

SECTION 17.—EVIDENCE OF OFFICIAL CHARACTER

JOHNSON v. STEDMAN.

(Supreme Court of Ohio, 1827. 3 Ohio, 94.)

This cause came up on a motion for a new trial, adjourned here from the county of Meigs. It was an action of trespass for taking and converting goods. The defendant pleaded that he was a constable, and that an execution was put into his hands to be levied, by virtue of which he took the goods in question as the property of the defendant in execution, the now plaintiff. Upon this plea issue was joined. At the trial the defendant, to establish the fact that he was a constable, offered parol evidence, and no other, that he acted and officiated as constable of the township at the time the levy was made. The plaintiff objected to the admission of this evidence, but the court received it, and a verdict passed for the defendant. A motion was made for a new trial, upon the ground that improper testimony was admitted; maintaining that the actual appointment in writing, and other requisites, should be produced in evidence.

HITCHCOCK, J.[19] The question now presented to the court was considered at the last term, in the case of Barret v. Reed, 2 Ohio, 409, but, inasmuch as there was some difference of opinion, and that case was decided upon a different point, was left undetermined.

But one serious objection is made to the admissibility of the evidence received on the trial of the issue in this case. It is this: That if such testimony is received, the rule "that the best evidence which the nature of the thing admits, and is capable of, must always be given," will be violated. * * *

Constables in Ohio are township officers, although in some few instances they may serve process in any part of the county. They are elected by the people at their annual township elections, and any person elected and refusing to serve is subject to a penalty. Within ten days after the election, the individual elected is to take an oath of office, which oath may be administered by the township clerk, or any other person having general authority to administer oaths. In addition to this, before entering on the duties of his office, he must give a bond with one or more sureties, to be approved of by the trustees of the township, for a sum not exceeding two thousand dollars, payable to the state of Ohio, conditioned for the faithful discharge of those duties. The election, the giving of bonds, the approval of the sureties, the administration of the oath of office, ought to be noted by the township clerk in his book of record. This would undoubtedly

[19] A portion of the opinion is omitted.

be done should the clerk, and every other officer concerned, do their duty. The constable, however, receives no certificate or other written document to prove his official character and qualifications. The best evidence "the nature of the thing admits of" to prove this official character would undoubtedly be the township records, provided these records had been properly kept. Experience, however, teaches us that in many parts of the country these records are so loosely kept that we are, from necessity, compelled to resort to evidence of a secondary nature.

Under these circumstances, does either policy, justice, or law dictate that, in cases like the present, we should strictly adhere to the rule that the best evidence which the nature of the thing admits of and is capable of shall be given? So far as it respects third persons, there is no doubt on the subject. Where such persons are interested, it is believed to be the practice of all courts to permit them to prove that an individual who claims to be a public officer is such de facto, without requiring them to prove that he is such de jure. The great danger which will result from adopting the same rule of evidence, where the officer himself is a party, is not readily conceived. There is a difference, it is true, between the two cases. Every man who undertakes to exercise the duties of an office ought to know whether he is legally qualified, while this knowledge cannot be supposed to extend to others. This difference of circumstances, however, is not so great as to require a difference in the rule of evidence.

In deciding this question, it may not be improper to turn our attention for a moment to the nature of those suits in which constables or other ministerial officers are parties. In some cases the principal question is whether the party is, or is not, an officer de jure. But such cases are not of frequent occurrence. Were it otherwise, it might be expedient to adopt a different rule of evidence. It is believed, however, that in ninety-nine cases in a hundred this is a question of secondary importance. The object more generally is to determine the right of property, the legality of process, the validity of an arrest, or something of a similar nature. In most of these cases, to require of the party, claiming to be a public officer, proof that he had complied with every requisite of the law to qualify him to act, would be attended with unreasonable inconvenience to him, without any commensurate advantage to his opponent.

In the case before the court, the real question in dispute was not whether Stedman was a constable, but whether the house which was the subject-matter of litigation was the property of Johnson, the plaintiff, or the property of Hollingsworth. Under these circumstances, the evidence was properly received. It was sufficient for the purposes of this case to prove that Stedman was a constable de facto.

The principle here decided is supported by high and unquestionable authority. In the case of Potter v. Luther, 3 Johns. 431, the Supreme Court of the state of New York say: "It is a general rule to

admit proof by reputation that a person acts as a general public officer or deputy." In Berryman v. Wise, 4 Term, 336, the Court of King's Bench, in England, decided that in the case of all peace officers, justices of the peace, constables, etc., it was sufficient to prove that they acted in these characters, without producing their appointment. This, to be sure, was the expression of Justice Buller; but, from an examination of the case, I am satisfied it was the opinion of the whole court. So in Esp. Dig. 783, it is laid down that cases similar to the one under consideration are exceptions to the general rule "that the best evidence, etc., must always be given."

Upon the whole, we are of opinion that the motion for a new trial must be overruled and judgment entered on the verdict.

ELDRED v. SEXTON.

(Supreme Court of Ohio, 1831. 5 Ohio, 215.)

Action of trespass against the treasurer of a school district for taking and converting a yoke of oxen, which were seized for nonpayment of a tax.

PER CURIAM. The question raised in the case seems to have been settled by this court, in the case of Johnson v. Stedman, 3 Ohio, 94. In that case it was decided that a person, who has justified an act upon the ground that he was a constable, might establish his official character by general reputation and proof that he acted as such. We are not disposed to change the principle established in that case. In fact, we are satisfied that it is more consistent with the ends of justice than to establish a contrary rule of evidence. We do not say that such evidence is conclusive; but that it is prima facie, and, unless contradicted, must be conclusive.[20]

McCOY v. CURTICE.

(Supreme Court of Judicature of New York, 1832. 9 Wend. 17, 24 Am. Dec. 113.)

Error from the Orange common pleas.

McCoy sued Curtice in an action of trover for a watch. The defendant pleaded the general issue. The plaintiff proved the taking of the watch and its value. The defendant justified as collector of a school district, viz., school district No. 15, situate partly in the town of Warwick and partly in the town of Goshen, in the county of Orange. He produced a warrant, signed by S. Jayne and J. Fox, as trustees of

[20] See Case v. Hall, 21 Ill. 632 (1859), defendant desiring to justify as officer must allege that he has been duly elected and has qualified; Rounds v. Mansfield, 38 Me. 586 (1854), must prove that he has qualified.

the school district, commanding certain moneys to be levied as a tax, and amongst others of McCoy, and proved by parol that Jayne and Fox were reputed to be, and acted as, trustees of the district, and also proved by parol that he, the defendant, had acted as collector, and that as such collector he had levied upon the watch of the plaintiff. The plaintiff objected to the parol evidence when offered, but the objection was overruled. He also objected to the warrant being received in evidence, until the erection of the district was shown by the production of the records of the towns of Warwick and Goshen, and insisted that, even were they produced, the warrant was illegal in having been issued by only two instead of three trustees. These objections were also overruled. The jury, under the charge of the court, found a verdict for the defendant, and the plaintiff sued out a writ of error.

SUTHERLAND, J. It is a general rule in relation to all public officers that they may establish their official character by proving that they are generally reputed to be, and have acted as, such officers, without producing their commission or other evidence of their appointment. This is well established, as to all peace officers, sheriffs, constables, justices of the peace, etc. 4 T. R. 366; Potter v. Luther, 3 Johns. 431; Cowen's Tr. 572, note "m"; Young v. Commonwealth, 6 Bin. (Pa.) 88; Fowler v. Bebee, 9 Mass. 231, 6 Am. Dec. 62; People v. Collins, 7 Johns. 549; McInstry v. Tanner, 9 Johns. 135; Reed v. Gillet, 12 Johns. 296; Wilcox v. Smith, 5 Wend. 231, 21 Am. Dec. 213; 16 Viner, 113, 14.

In Rex v. Jones, 2 Campb. 131, a letter was permitted to be read purporting to be from the lords commissioners of the treasury, without any evidence except what appeared on the face of the letter that they were commissioners. That, too, was a criminal case, and it was distinctly objected on the part of the defendant that the authority of the commissioners should be shown by producing the commission by which they were appointed. The trustees and collector of a school district are regular officers, annually chosen, with powers and duties well defined and regulated by statute; and it is not perceived why their official characters may not be shown in the same manner as that of a justice of the peace or a constable. They are officers of almost equal notoriety, and the duties of a collector are very much of the same nature, as those of a constable. Laws 1819, p. 198, §§ 20 to 25.

I am inclined to think, therefore, the parol evidence upon these points was admissible. Whether it was sufficient or not is a question which does not arise on this bill of exceptions. The objections are specifically to the nature of the evidence, and not to its defect or sufficiency. * * *[21]

Judgment affirmed.

[21] For rest of opinion, see ante, p. 89.

PATTERSON v. MILLER.

(Court of Appeals of Kentucky, 1859. 2 Metc. 493.)

Chief Justice SIMPSON delivered the opinion of the court.[22]

This action was brought by William F. Patterson against James P. Miller and William H. Haynes, to recover damages for an alleged illegal seizure and sale by them of his personal property. The plaintiff stated in his petition that the defendant Miller pretending to be the sheriff of Russell county, when in reality he was not the constitutional sheriff of that county, unlawfully and without authority took into his possession and sold a sorrel mare, the property of the plaintiff, and that the defendant Haynes purchased said mare at the aforesaid illegal sale and converted her to his own use.

The defendant Miller averred in his answer that he was the sheriff of Russell county, duly elected and qualified according to law, and as such seized the property in the petition mentioned, and made sale thereof, under and by virtue of two executions which issued from the office of the presiding judge of the Russell county court, and were placed in his hands for collection; and the defendant Haynes, in his answer, admitted that he had purchased the property so sold, and insisted that he had a right to make the purchase, as the property was sold under execution by a person who was acting as sheriff of the county.

The defendant Miller read as evidence upon the trial the certificate of his election as the sheriff of Russell county, and the records of the county court, by which it appeared that he had qualified and executed an official bond as sheriff, according to law. The plaintiff then offered to prove that Miller was not a resident of Russell county at the time he was elected, but was then, and still was, a resident of Adair county. This testimony was rejected by the court on the ground that the certificate of the examining board was conclusive evidence, not only of Miller's election as sheriff, but also of his eligibility to the office. The court, however, decided that evidence might be offered to show that he had removed from the county since his election, although evidence that he was not a resident of the county at the time of his election was inadmissible. The correctness of this decision of the court below is the only question presented for our consideration.

By the sixth article of the Constitution it is provided that no person shall be eligible to the office of sheriff who has not resided one year next preceding the election in the county for which he is a candidate. * * * Whether the acts of a sheriff, who has forfeited his office by a removal from the county, would be valid, and could be relied on for his own protection, until his office should, by a direct proceeding against him, be declared vacant, it is not necessary now to de-

[22] Only a portion of the opinion is printed.

termine. Such acts would, however, according to well-settled principles, be legal and valid, so far as third parties were concerned.

But where a person is constitutionally ineligible to an office, he will not be the lawful incumbent thereof, although he may be elected, obtain a certificate of his election from the examining board, take the oath of office, and execute the bond prescribed by law. Are the acts of the officer in such a case legal to any extent; and, if so, to what extent are they legal?

As he holds his office by color of right, and acts as sheriff, all his acts as such are regarded as lawful, so far as third parties are concerned. Public policy requires that they should be so regarded, and that his official authority should not be questioned collaterally. He acts as the sheriff of the county, and it is to the interest of its citizens that his acts should be declared to be valid, so long as he continues thus to act. It has been accordingly held that a person unconstitutionally commissioned a justice of the peace was an officer de facto, and his acts valid as to third persons. Justices of Jefferson County v. Clark, 1 T. B. Mon. 86; Wilson v. King, 3 Litt. 459, 14 Am. Dec. 84. He remains an officer de facto, until his office shall be declared to be vacant or forfeited, by a direct proceeding against him, instituted and carried on for that purpose. Stokes v. Kirkpatrick, 1 Metc. 143.

Can he, however, in an action against himself, for acting as sheriff, and seizing and selling the property of the plaintiff without lawful authority, defeat the right of recovery, by showing that he acted as an officer de facto, or by relying on his certificate of election and qualification in the county court, as conclusive evidence that he was the lawful sheriff of the county?

The principle is well established that, although the acts of an officer de facto are valid as to third persons, nevertheless they are invalid so far as he is himself concerned; and his mere color of title to the office will not avail him as a protection in actions against him for trespasses on person or property. Rodman v. Harcourt, 4 B. Mon. 229.

It only, therefore, remains for us to inquire whether the certificate of election and the fact that he qualified and gave bond in the county court, as prescribed by law, furnish conclusive evidence that he was the lawful incumbent of the office of sheriff of Russell county.

The examining board is constituted by law for the mere purpose of comparing the polls, and giving a certificate of his election to the candidate having the largest number of votes, according to the returns which have been made by the officers who conducted the election at the different places of voting in the county. It is not the duty of this board to examine into or decide upon the qualifications of the candidates for the office to which they are elected. Consequently the certificate which it issues to a candidate that he is elected to an office is not even prima facie evidence that he was eligible to the office, although conclusive evidence that he was elected thereto, unless his election be contested before the proper board.

The duty which the law devolves upon the county court, in regard to the sheriff, only extends to the administration of the appropriate oath of office, and the taking of a bond with sufficient sureties to be approved of by it. The performance of this duty is incumbent on the county court whenever a person claiming to be entitled to the office of sheriff presents a certificate of his election from the proper board. The court has no power to inquire into his eligibility, or to refuse to permit him to qualify and execute a bond according to law, on the ground that he is ineligible to the office. Consequently, the fact that he has qualified and given an official bond in the county court as sheriff cannot be relied upon to prove his eligibility to the office. * * *

We decide, therefore, in this case, that as Miller acted under color of title to the office of sheriff the sale made by him under the executions in his hands is sufficient to protect the purchaser. But if he were constitutionally ineligible to the office of sheriff when elected, the law will not so far encourage a violation of the Constitution as to permit him to protect himself under a mere color of authority, exercised in opposition to an express mandate of the Constitution, when, too, he must have known that his title to the office was not legal, and, therefore, that all his acts as sheriff were without authority and against law.

The court below, therefore, erred in rejecting the evidence, which was offered to be introduced on the trial, to prove that Miller was not a resident of Russell county when he was elected to the office of sheriff.

Wherefore the judgment is reversed, and cause remanded for a new trial and further proceedings not inconsistent with the principles of this opinion.

The judgment for the appellant's costs in this court must be against Miller alone.[23]

SECTION 18.—DE FACTO OFFICE AND AUTHORITY

PEOPLE ex. rel. BUSH v. COLLINS.

(Supreme Court of New York, 1811. 7 Johns. 549.)

An alternative mandamus was directed to a town clerk, commanding him to record the survey of a road, pursuant to the act (Laws 24th Sess. c. 186), or show cause; and the clerk returned that he did not record the survey because the commissioners had not taken the oath of office, and filed a certificate of the oath with the clerk, according to the act.

[23] See Courser v. Powers, 34 Vt. 517 (1861).

PER CURIAM.[24] * * * Nor is the allegation material, in this case, that the commissioners had not caused a certificate of their oath of office to be filed in the town clerk's office. If the commissioners of highways acted without taking the oath required by law, they were liable to a penalty; or the town, upon their default in complying with the requisition of the statute, might have proceeded to a new choice of commissioners. But if the town did not (and it does not appear that they did in this case), the subsequent acts of the commissioners, as such, were valid, as far as the rights of third persons and of the public were concerned in them. They were commissioners de facto, since they came to their office by color of title; and it is a well-settled principle of law that the acts of such persons are valid when they concern the public, or the rights of third persons who have an interest in the act done; and this rule is adopted to prevent the failure of justice. The limitation to this rule is as to such acts as are arbitrary and voluntary, and do not affect the public utility. The doctrine on this subject is to be found at large, in the case of Rex v. Lisle, Andrews, 263. It certainly did not lie with the defendant, as a mere ministerial officer, to adjudge the act of the commissioners null. It was his duty to record the paper; valeat quantum valere potest. It was enough for him that those persons had been duly elected commissioners within the year, and were in the actual exercise of the office. It may be that the oath was duly taken, and that the omission to file the certificate of it was owing to casualty or mistake. The validity of the title of the commissioners to their office must not be determined in this collateral way.

The opinion of the court, accordingly, is that the rule for a peremptory mandamus be granted.[25]

PEOPLE v. HOPSON.

(Supreme Court of New York, 1845. 1 Denio, 574.)

The defendants were indicted for assaulting and beating Peter Lascells, a constable of the town of Salisbury, Herkimer county, and resisting him in the execution of his duty as such constable.

BRONSON, C. J.[26] * * * The next question is on the offer to show that Lascells had not taken the oath of office, or given security, and so was not a legal officer. The evidence would be proper if Lascells, instead of the people, was the party complaining of an injury. If he were suing to recover damages for the assault, it would probably

[24] Only a portion of the opinion is printed.

[25] See State v. Carroll, 38 Conn. 449, 9 Am. Rep. 409 (1871); also an article on De Facto Office by K. R. Wallach, in 22 Political Science Quarterly, 450.

[26] Only a portion of the opinion is printed.

be a good answer to the action that he was not a legal officer, but a wrongdoer, who might be resisted. And clearly he cannot recover fees, or set up any right of property, on the ground that he is an officer de facto, unless he be also an officer de jure. Riddle v. County of Bedford, 7 Serg. & R. (Pa.) 386; Keyser v. McKissan, 2 Rawle (Pa.) 139; Fowler v. Beebe, 9 Mass. 231, 6 Am. Dec. 62; Green v. Burke, 23 Wend. 490; People v. White, 24 Wend. 526. When one man attempts to exercise dominion over the person or property of another, it becomes him to see that he has an unquestionable title.

But it is equally well settled that the acts of an officer de facto, though his title may be bad, are valid so far as they concern the public, or the rights of third persons who have an interest in the things done. Society could hardly exist without such a rule. I will only refer to two or three cases where many of the others have been collected. People v. Stevens, 5 Hill, 630; Green v. Burke, 23 Wend. 490; Taylor v. Skrine, 2 Tread. Const. (S. C.) 696. Now here, although Lascells is a witness, he is not a party; nor is this a proceeding for his benefit. The people are prosecuting for a breach of the public peace; and it is enough that Lascells was an officer de facto, having color of authority. The rights of the creditor, the due administration of justice, and the good order of society all concur in requiring that he should be respected as an officer until his title has been set aside by due process of law. The evidence offered was properly rejected. * * *[27]

PEOPLE ex rel. WINSTANLEY v. WEBER.

(Supreme Court of Illinois, 1878. 89 Ill. 347.)

This was an application in this court by Thomas Winstanley, as city treasurer of the city of East St. Louis, for a writ of mandamus against Herman G. Weber, county collector of St. Clair county, to compel him to pay over to the relator moneys collected by him and taxes belonging to the city of East St. Louis. The defendant's plea presented the question of the validity of the relator's election.

Mr. Justice DICKEY delivered the opinion of the court.[28]

While the acts of an officer de facto are valid, in so far as the rights of the public are involved, and in so far as the rights of third persons

[27] Accord: Heath v. State, 36 Ala. 273 (1860); State v. Dierberger, 90 Mo. 369, 2 S. W. 286 (1886). See Commonwealth v. Kane, 108 Mass. 423, 11 Am. Rep. 373 (1871).

See, also, Rodman v. Harcourt, 4 B. Mon. (Ky.) 224, 230 (1843), warrant of justice de facto protects constable; Bedford v. Rice, 58 N. H. 446 (1878), on action for penalty by town sufficient that health officers were officers de facto only. See, also, Patterson v. Miller, 2 Metc. (Ky.) 493 (1859), ante, p. 109, purchaser from de facto sheriff protected.

[28] Only a portion of the opinion is printed.

having an interest in such acts are concerned, still, where a party sues or defends in his own right as a public officer, it is not sufficient that he be merely an officer de facto. To do this he must be an officer de jure. As an officer de facto he can claim nothing for himself. People ex rel. Sullivan v. Weber, 86 Ill. 283. * * *

The commission under which relator claims title recites that it is issued in pursuance of an election held on the 16th day of April, 1878, and the answer to relator's petition states that "it is from this pretended election that relator obtains all the title he has to the pretended office claimed by him." This allegation of the answer is confessed by demurrer. * * *[29]

In the case of Stephens v. People ex rel., 89 Ill. 337, we have held void the election through which relator claims to have acquired the supposed office. * * * It follows that the relator is not a public officer of the character held necessary to entitle him to the relief sought. The application for a writ of mandamus must be denied.

[29] Accord: Romero v. United States, 24 Ct. Cl. 331 (1889).

CHAPTER IV

NOTICE

SECTION 19.—IN TAXATION

BELL'S GAP R. CO. v. COMMONWEALTH OF PENNSYLVANIA.

(Supreme Court of United States, 1890. 134 U. S. 232, 10 Sup. Ct. 533, 33 L. Ed. 892.)

In Error to the Supreme Court of Pennsylvania.

BRADLEY, J.[1] * * * By the law of Pennsylvania, all moneyed securities are subject to an annual state tax of three mills on the dollar of their actual value, except bonds and other securities issued by corporations, which are taxed at three mills on the dollar of the nominal or par value. If the treasurer of a corporation fails to make return of its loans, as required by law, the Auditor General makes out and files an account against the company, charging it with the tax supposed to be due. This account, if approved by the State Treasurer, is served upon the corporation, which must pay the tax within a specified time, or show good cause to the contrary. If it objects to the tax, it is authorized, in common with all others who are dissatisfied with the Auditor's stated accounts, to appeal to the court of common pleas of the county where the seat of government is (at present Dauphin county), which appeal is served on the Auditor General, and by him transmitted to the clerk of said court, to be entered of record, subject to like proceedings as in common suits. A declaration is then filed on the stated account in behalf of the state, and the cause is regularly tried. In the present case, on failure of the company (the Bell's Gap Railroad Company) to make return except under protest, the auditor general made out an account against it, containing the following charge:

Nominal value of scrip, bonds, and certificates of indebtedness owned by residents of Pennsylvania, $539,000—tax, three mills.... $1,617 00

The company thereupon tendered an appeal, which was filed in the court of common pleas of Dauphin county, a declaration was filed on the part of the state, and the cause was tried by the court, a jury being waived. The appeal filed by the corporation (which was the

[1] Only a portion of the opinion is printed.

basis of the proceedings in the court) contained eight grounds of objection to the tax. Most of these objections were founded upon the Constitution or laws of Pennsylvania, and need not be noticed here. The second objection, which refers to the Constitution of the United States, was as follows, to wit: "(2) The report of the company's treasurer was made under protest, and does not constitute an assessment, and the tax sought to be imposed on so much of the company's loans as the commonwealth claims to be held by residents of Pennsylvania for their nominal or face value, which varies from the market value on account of the differing rates of interest, etc., is illegal, and the said tax cannot be lawfully deducted by the company's treasurer from the interest payable to the holders of said loans, and the commonwealth's demands contravene section 1 of the fourteenth amendment to the Constitution of the United States, for the following reasons."

Among the reasons then assigned are (1) that the nominal value of the bonds is not their real value; (2) that the owners of the bonds have no notice, and no opportunity of being heard; (3) that the company is taxed for property it does not own; (4) that the deduction of the tax from the interest payable to the bondholders is taking their property without due process of law, and denies to them the equal protection of the laws, since all other personal property in the state is taxed at its actual value, and upon notice to the owners. The seventh objection is as follows: "(7) The tax is void, as impairing the company's obligation to its creditors." * * *

As to want of notice to the owners of the bonds: What notice could they have which the law does not give them? They know that their bonds are to be assessed at their face value, and that a tax of three mills on the dollar of that value will be imposed, and that they will only be required to pay this tax when and as they receive the interest. If the state may assess the tax upon the face value of the bonds, notice in pais is not necessary. We think that there is nothing in this objection which shows any infraction of the federal Constitution. It is urged that it is a taking of the bondholder's property without due process of law. We must confess that we cannot see it in this light. The process of taxation does not require the same kind of notice as is required in a suit at law, or even in proceedings for taking private property under the power of eminent domain. It involves no violation of due process of law when it is executed according to customary forms and established usages, or in subordination to the principles which underlie them. We see nothing in the process of taxation complained of which is obnoxious to constitutional objection on this score. Stockholders in the national banks are taxed in this way, and the method has been sustained by the express decision of this court. Bank v. Com., 9 Wall. 353, 19 L. Ed. 701. * * *

HAGAR v. RECLAMATION DIST. NO. 108.

(Supreme Court of United States, 1884. 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569.)

Appeals from the United States Circuit Court for the District of California.

FIELD, J.[2] By an act of the Legislature of California, passed in 1868, a general system was established for reclaiming swamp and overflowed salt marsh and tide lands in the state, of which there is a large quantity, and thus fitting them for cultivation. It will be sufficient for the purposes of this suit to state the general features of the system without going much into detail. It provides for the formation of reclamation districts where lands of the kind stated are susceptible of one mode of reclamation; such districts to be established by the board of supervisors of the county in which the lands, or the greater part of them, are situated, upon the petition of one-half or more of the holders thereof. The petition being granted, the petitioners are required to establish such by-laws as they may deem necessary for the work of reclamation, and to keep the same in repair; and to elect three of their number to act as a board of trustees to manage the same. This board is empowered to employ engineers and others to survey, plan, and estimate the cost of the work, and of land needed for right of way, including drains, canals, sluices, watergates, embankments, and material for construction; and to construct, maintain, and keep in repair all works necessary for the object in view. The trustees are required to report to the board of supervisors of the county, or, if the district be in more than one county, to the board of supervisors in each county, the plans of the work and estimates of the cost, together with estimates of the incidental expenses of superintendence and repairs. The supervisors are then to appoint three commissioners, who are jointly to view and assess upon each acre to be reclaimed or benefited a tax proportionate to the whole expense, and to the benefits which will result from the works; which tax is to be collected and paid into the county treasury or treasuries, as the case may be, and placed to the credit of the district, to be paid out for the work of reclamation, upon the order of the trustees, when approved by the board of supervisors of the county. If the district be in more than one county, the tax is to be paid into the treasury of the county in which the land assessed is situated. If the original assessment be insufficient for the complete reclamation of the lands, or if further assessments be required for the protection, maintenance, and repair of the works, the supervisors may order additional assessments upon presentation by the trustees of a statement of the work to be done, and an estimate of its cost, such assessments to be levied, and, if delinquent, collected, in the same manner as the original assessment. The commissioners are required to make a list of the

[2] Only a portion of the opinion is printed.

amounts due from each owner of land in the district, and of the amount assessed against the unsold land, and file the same with the treasurer of the county in which the lands are situated. The lists thus prepared are to remain in the office of the treasurer for 30 days or longer, if so ordered by the trustees, during which time any person can pay to the treasurer the amount assessed against his land; but if, at the end of the 30 days, or the extended time, the tax has not been paid, the treasurer is to transmit the list to the district attorney, who is to proceed at once against the delinquents in the manner provided by law for the collection of state and county taxes.

The Political Code of the state, which went into effect on the 1st of January, 1873, embraces substantially the provisions of the act of 1868. The changes are more in language than in substance. So far as subsequent proceedings are concerned, the Code prescribes the rule. The reclamation district No. 108, the plaintiff in the court below, was established in September, 1870, under the act of 1868. It embraces over 74,000 acres of land, situated in the counties of Yolo and Colusa, and forming a compact body susceptible of one mode of reclamation. The trustees of the district originally estimated the cost of the reclamation works, including incidental expenses, at $140,000, and the commissioners appointed assessed that sum upon the lands in the district. The amount proved to be insufficient to complete the works, and, upon the report of the trustees that the further sum of $192,000 was required for that purpose, the supervisors ordered that amount to be assessed, and the commissioners appointed by them levied the assessment upon the lands. This assessment became delinquent, and the present suits were brought to obtain a decree that the several amounts charged upon the lands of the appellant are liens upon them, and for their sale to satisfy the charges. One of the suits is to enforce the lien on the lands in Yolo county, and the other the liens on the lands in Colusa county. On his motion they were both removed to the circuit court of the United States. That court held in each case that the several sums assessed were valid liens upon the lands of the appellant on which they were levied, and ordered that the lands be sold for the payment of the amounts, with interest and costs. From these decrees the appeals are taken. * * *

The appellant contends that this fundamental principle[3] was violated in the assessment of his property, inasmuch as it was made without notice to him, or without his being afforded any opportunity to be heard respecting it; the law authorizing it containing no provision for such notice or hearing. His contention is that notice and opportunity to be heard are essential to render any proceeding due process of law which may lead to the deprivation of life, liberty, or property.

[3] I. e., that there can be no proceeding against life, liberty, or property, which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights.

Undoubtedly where life and liberty are involved, due process requires that there be a regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard; so, also, where title or possession of property is involved. But where the taking of property is in the enforcement of a tax, the proceeding is necessarily less formal, and whether notice to him is at all necessary may depend upon the character of the tax, and the manner in which its amount is determinable. The necessity of revenue for the support of the government does not admit of the delay attendant upon proceedings in a court of justice, and they are not required for the enforcement of taxes or assessments. As stated by Mr. Justice Bradley, in his concurring opinion in Davidson v. New Orleans [96 U. S. 97, 24 L. Ed. 616]: "In judging what is 'due process of law' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or some of these; and, if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law,' but if found to be arbitrary, oppressive, and unjust, it may be declared to be not 'due process of law.'"

The power of taxation possessed by the state may be exercised upon any subject within its jurisdiction, and to any extent not prohibited by the Constitution of the United States. As said by this court: "It may touch property in every shape, in its natural condition, in its manufactured form, and in its various transmutations. And the amount of the taxation may be determined by the value of the property, or its use, or its capacity, or its productiveness. It may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the federal Constitution, the power of the state, as to the mode, form, and extent of taxation, is unlimited where the subjects to which it applies are within her jurisdiction." State Tax on Foreign-Held Bonds, 15 Wall. 319, 21 L. Ed. 179.

Of the different kinds of taxes which the state may impose, there is a vast number of which, from their nature, no notice can be given to the taxpayer, nor would notice be of any possible advantage to him, such as poll taxes, license taxes (not dependent upon the extent of his business), and, generally, specific taxes on things or persons or occupations. In such cases the Legislature in authorizing the tax fixes its amount, and that is the end of the matter. If the tax be not paid the property of the delinquent may be sold, and he be thus deprived of his property. Yet there can be no question that the proceeding is due process of law, as there is no inquiry into the weight of evidence, or other element of a judicial nature, and nothing could be changed by hearing the taxpayer. No right of his is therefore invaded. Thus, if the tax on animals be a fixed sum per head, or on articles a fixed sum per yard or bushel or gallon, there is nothing the owner can do which can affect the amount to be collected from him. So, if a person wi

a license to do business of a particular kind, or at a particular place, such as keeping a hotel or a restaurant, or selling liquors or cigars or clothes, he has only to pay the amount required by the law and go into the business. There is no need in such cases for notice or hearing. So, also, if taxes are imposed in the shape of licenses for privileges, such as those on foreign corporations for doing business in the state, or on domestic corporations for franchises, if the parties desire the privilege they have only to pay the amount required. In such cases there is no necessity for notice or hearing. The amount of the tax would not be changed by it.

But where a tax is levied on property not specifically, but according to its value, to be ascertained by assessors appointed for that purpose, upon such evidence as they may obtain, a different principle comes in. The officers in estimating the value act judicially, and in most of the states provision is made for the correction of errors committed by them, through boards of revision or equalization, sitting at designated periods provided by law, to hear complaints respecting the justice of the assessments. The law, in prescribing the time when such complaints will be heard, gives all the notice required, and the proceeding by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquent's property, is due process of law.[4]

In some states, instead of a board of revision or equalization, the assessment may be revised by proceedings in the courts and be there corrected if erroneous, or set aside if invalid; or objections to the validity or amount of the assessment may be taken when the attempt is made to enforce it. In such cases all the opportunity is given to the taxpayer to be heard respecting the assessment which can be deemed essential to render the proceedings due process of law.

In Davidson v. New Orleans, this court decided this precise point. In that case an assessment levied on certain real property in New Orleans for draining the swamps of that city was resisted on the ground that the proceeding deprived the owners of their property without due process of law, but the court refused to interfere, for the reason that the owners of the property had notice of the assessment and an opportunity to contest it in the courts. After stating that much misapprehension prevailed as to the meaning of the terms "due process of law," and that it would be difficult to give a definition that would be

[4] That the duties of assessors in estimating the value of property for purposes of general taxation are judicial, see Barhyte v. Shepherd, 35 N. Y. 238, 250 (1866); Hassan v. Rochester, 67 N. Y. 528, 536 (1876); Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289 (1878); Williams v. Weaver, 75 N. Y. 30, 33 (1878); Cooley, Tax'n, 266; Burroughs, Tax'n, § 102; Jordan v. Hyatt, 3 Barb. (N. Y.) 275, 283 (1848); Ireland v. Rochester, 51 Barb. (N. Y.) 416, 430, 431 (1868); State v. Jersey City, 24 N. J. Law, 662, 666 (1855); State v. Morristown, 34 N. J. Law, 445 (1871); Griffin v. Mixon, 38 Miss. 437, 438 (1860), note to official report of case.

at once perspicuous and satisfactory, the court, speaking by Mr. Justice Miller, said that it would lay down the following proposition as applicable to the case: "That whenever by the laws of a state, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections." 96 U. S. 97, 24 L. Ed. 616.

This decision covers the cases at bar. The assessment under consideration could, by the law of California, be enforced only by legal proceedings, and in them any defense going either to its validity or amount could be pleaded. In ordinary taxation assessments, if not altered by a board of revision or of equalization, stand good, and the tax levied may be collected by a sale of the delinquent's property; but assessments in California, for the purpose of reclaiming overflowed and swamp lands, can be enforced only by suits, and, of course, to their validity it is essential that notice be given to the tax-payer, and opportunity be afforded him to be heard respecting the assessment. In them he may set forth, by way of defense, all his grievances. Reclamation Dist. No. 108 v. Evans, 61 Cal. 104. If property taken upon an assessment, which can only be enforced in this way, be not taken by due process of law, then, as said by Mr. Justice Miller in the New Orleans Case, these words as used in the constitution, can have no definite meaning. The numerous decisions cited by counsel, some of which are given in the note, as to the necessity of notice and of an opportunity of being heard, are all satisfied where a hearing in court is thus allowed.[5] * * *

[5] Overing v. Foote, 65 N. Y. 269 (1875); Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289 (1878); Cooley, Tax'n, 265, 266, 298; Thomas v. Gain, 35 Mich. 155, 164, 24 Am. Rep. 535 (1876); Jordan v. Hyatt, 3 Barb. (N. Y.) 275, 283 (1848); Wheeler v. Mills, 40 Barb. (N. Y.) 646 (1863); Ireland v. Rochester, 51 Barb. (N. Y.) 416, 430, 431 (1868); State v. Jersey City, 24 N. J. Law, 662, 666 (1855); State v. Newark, 31 N. J. Law, 363 (1865); State v. Trenton, 36 N. J. Law, 499, 504 (1873); State v. Elizabeth City, 37 N. J. Law, 357 (1875); State v. Plainfield, 38 N. J. Law, 97 (1875); State v. Newark, 25 N. J. Law, 399, 411, 426 (1856); Patten v. Green, 13 Cal. 325 (1859); Mulligan v. Smith, 59 Cal. 206 (1881); Griffin v. Mixon, 38 Miss. 438 (1860); County of San Mateo v. Southern Pac. R. Co. (C. C.) 8 Sawy. 238, 13 Fed. 722 (1882); County of Santa Clara v. Same (C. C.) 9 Sawy. 165, 18 Fed. 385 (1883); Darling v. Gunn, 50 Ill. 424 (1869). See, also, Gatch v. City of Des Moines, 63 Iowa, 718, 18 N. W. 310, 311, 313 (1884); Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369 (1896), note to official report of case.

The leading case on the requirement of notice is Stuart v. Palmer, 74 N.

PITTSBURGH, C. C. & ST. L. RY. CO. v. BACKUS.

(Supreme Court of United States, 1894. 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. Ed. 1031.)

In Error to the Supreme Court of the State of Indiana.

Action to restrain the collection of taxes. The court rendered judgment for defendants, which, on appeal, was affirmed by the Supreme Court of the state. 133 Ind. 625, 33 N. E. 432.

Mr. Justice BREWER delivered the opinion of the court.[6] * * *

It is contended specifically that the act fails of due process of law respecting the assessment, in that it does not require notice by the state board at any time before the assessments are made final; and several authorities are cited in support of the proposition that it is essential to the validity of any proceeding by which the property of the individual is taken that notice must be given at some time and in some form before the final adjudication. But the difficulty with this argument is that it has no foundation in fact. The statute names the time and place for the meeting of the assessing board, and that is sufficient in tax proceedings; personal notice is unnecessary.

In State Railroad Tax Cases, 92 U. S. 610, 23 L. Ed. 663, are these words, which are also quoted with approval in the Kentucky Railroad Tax Cases, 115 U. S. 321, 6 Sup. Ct. 57, 29 L. Ed. 414: "This board has its time of sitting fixed by law. Its sessions are not secret. No obstruction exists to the appearance of any one before it to assert a right, or redress a wrong; and, in the business of assessing taxes, this is all that can be reasonably asked."

Again, it is said that the act does not require the state board to grant to the railroad companies any hearing or opportunity to be heard for the correction of errors at any time after the assessments have been agreed upon by the board, and before they are made final and absolute, or before the final adjournment of the board, and also that it gives to the board arbitrary power to deny to plaintiffs any hearing at any time; but the fact and the law are both against this contention. The plaintiff did appear before the board, and was heard, by its counsel and through its officers; and the construction placed

Y. 183, 30 Am. Rep. 289 (1878). See, also, Central of Georgia Ry. v. Wright, 207 U. S. 127, 28 Sup. Ct. 47, 52 L. Ed. 134 (1907).

As to notice before distraining goods for nonpayment of taxes, see Cooley, Taxation, pp. 441–443.

Notice before the assessment is not necessary, if there is an opportunity to contest the assessment before the board of review. Felsenthal v. Johnson, 104 Ill. 21 (1882).

See, also, Corcoran v. Board of Aldermen of Cambridge, 199 Mass. 5, 85 N. E. 155, 18 L. R. A. (N. S.) 187 (1908): "If the right to a hearing is given upon an appeal, or upon an application for an abatement, it is sufficient."

[6] Only a portion of this case is printed.

by the Supreme Court of the state on the act—a construction which is conclusive upon this court—is that the railroad companies are given the right to be present and to be heard.

It is urged that the valuation as fixed was not announced until shortly before the adjournment of the board, and that no notice was given of such valuation in time to take any steps for the correction of errors therein. If by this we are to understand counsel as claiming that there must be notice and a hearing after the determination by the assessing board, as well as before, we are unable to concur with that view. A hearing before judgment, with full opportunity to present all the evidence and the arguments which the party deems important, is all that can be adjudged vital. Rehearings, and new trials, are not essential to due process of law, either in judicial or administrative proceedings. One hearing, if ample, before judgment, satisfies the demand of the constitution in this respect. It not infrequently happens in this as in all other courts that decisions are announced and judgments entered on the last day of the term, and too late for the presentation or consideration of any petitions for rehearing or motions for a new trial. Will any one seriously contend that a judgment thus entered is entered in defiance of the requirements of due process of law, and that a party, having been fully heard once upon the merits of his case, is deprived of the constitutional protection because he is not heard a second time?

Equally fallacious is the contention that because to the ordinary taxpayer there is allowed not merely one hearing before the county officials, but also a right of appeal with a second hearing before the state board, while only the one hearing before the latter board is given to railroad companies in respect to their property, therefore the latter are denied the equal protection of the laws. If a single hearing is not due process, doubling it will not make it so; and the power of a state to make classifications in judicial or administrative proceedings carries with it the right to make such a classification as will give to parties belonging to one class two hearings before their rights are finally determined, and to parties belonging to a different class only a single hearing. Prior to the passage of the court of appeals act by Congress, in 1891, a litigant in the Circuit Court, if the amount in dispute was less than $5,000, was given but a single trial, and in that court; while, if the amount in dispute was over that sum, the defeated party had a right to a second hearing and in this court. Did it ever enter into the thought of any one that such classification carried with it any denial of due process of law? * * *

STATE RAILROAD TAX CASES.

(Supreme Court of United States, 1875. 92 U. S. 575, 23 L. Ed. 663.)

MILLER, J.[7] * * * There is, however, an objection urged to the conduct of the board of equalization, resting on the action of the board in these particular cases, in which they are charged with a gross violation of the law to the prejudice of the corporations, which we will consider.

The statute requires the proper officers of the railroad companies to furnish to the State Auditor a schedule of the various elements already mentioned as necessary in applying the statutory rule of valuation. It is charged that the board of equalization increased the estimates of value so reported to the Auditor, without notice to the companies, and without sufficient evidence that it ought to be done; and it is strenuously urged upon us that for want of this notice the whole assessment of the property and levy of taxes is void.

It is hard to believe that such a proposition can be seriously made. If the increased valuation of property by the board without notice is void as to the railroad companies, it must be equally void as to every other owner of property in the state, when the value assessed upon it by the local assessor has been increased by the board of equalization. How much tax would thus be rendered void it is impossible to say. The main function of this board is to equalize these assessments over the whole state. If they find that a county has had its property assessed too high in reference to the general standard, they may reduce its valuation; if it has been fixed too low, they raise it to that standard. When they raise it in any county, they necessarily raise it on the property of every individual who owns any in that county. Must each one of these have notice and a separate hearing? If a railroad company is by law entitled to such notice, surely every individual is equally entitled to it. Yet if this be so, the expense of giving notice, the delay of hearing each individual, would render the exercise of the main function of this board impossible. The very moment you come to apply to the individual the right claimed by the corporation in this case, its absurdity is apparent. Nor is there any hardship in the matter. This board has its time of sitting fixed by law. Its sessions are not secret. No obstruction exists to the appearance of any one before it to assert a right, or redress a wrong; and, in the business of assessing taxes, this is all that can be reasonably asked.

As we do not know on what evidence the board acted in regard to these railroads, or whether they did not act on knowledge which they possessed themselves, and as all valuation of property is more or less matter of opinion, we see no reason why the opinion of this

[7] Only a portion of the opinion of Mr. Justice Miller is printed.

court, or of the Circuit Court, should be better, or should be substituted for that of the board, whose opinion the law has declared to be the one to govern in the matter. * * *[8]

KUNTZ v. SUMPTION.

(Supreme Court of Indiana, 1889. 117 Ind. 1, 19 N. E. 474, 2 L. R. A. 635.)

Appeal from circuit court, Randolph county.

ELLIOTT, C. J. The board of equalization of Randolph county entered an order reading thus: "On motion, the board increased the assessment of Peter Kuntz on personal property twenty thousand dollars." Prior to the meeting of the board Kuntz had listed his property for taxation. He was subpœnaed before the board, and testified as a witness, but did so under protest.

We have given to the principal question in this case much and careful study, and we are compelled to hold that the statutory provisions concerning the authority of the county board of equalization to increase the valuation of the property of an individual taxpayer listed by him for taxation are unconstitutional. We limit our decision to this point, and mark the limit as distinctly and definitely as we can. We do not affirm that the provisions of the statute conferring authority upon the county board to change the general levy are invalid, nor do we affirm that they are invalid in so far as they confer authority to make orders affecting the taxpayers generally. We do, however, affirm that they are invalid in so far as they assume to confer authority upon the board to conclusively change the valuation placed upon property by an individual taxpayer, or to add property to his list. We are satisfied that the statute is in conflict with the Constitution, for the reason that it assumes to confer authority upon the board to add to a citizen's taxes without giving him an opportunity to be heard, and thus denies him due process of law.

Our judgment is that after a citizen has listed his property no change in the list can be compulsorily made by an officer or tribunal whose decision is final, until, by due process of law, he has had an opportunity to vindicate the correctness of his list, or resist an attempt to increase the valuation. The presumption is that men obey the law and act in good faith, and under this long-settled rule it must be held that, until the contrary is shown, the taxpayer is entitled to have his list accepted as correct and just. The contrary cannot be legally and conclusively

[8] See Illinois Revenue Law 1898, § 35: "* * * The assessment of any class of property, or of any township or part thereof, or any portion of the county, shall not be increased until the board shall have notified not less than fifty of the owners of property in such township, or part thereof, or portion of the county of such proposed increase, and given them, or any one representing them, or other citizens of said territory, an opportunity to be heard."

shown, unless he has an opportunity to be heard, and this opportunity he cannot have unless notice is given him before a conclusive decision is made. The statute does not provide for notice to taxpayers whose taxes it is proposed to increase, and this infirmity destroys it in so far as it affects such citizens. It is not enough that in fact the taxpayer does have some notice or information, for the law must provide for notice, or else no legal notice can be given. A man may be subpœnaed as a witness in an action pending against him, but unless he is summoned or notified as a party under some law authorizing a summons or a notice the proceedings are utterly void. A man may be served with a written notice that a petition for a ditch is pending, but, if there is no law authorizing notice, it will be unavailing. A notice not authorized by law is in legal contemplation no notice. We do not assert that the proceedings would be void where there is some notice, although not given in strict conformity to law; for we know that a defective notice, assumed to be given under a statute, will be sufficient to uphold jurisdiction as against a collateral attack. Montgomery v. Wasem, 116 Ind. 343, 15 N. E. 795 (this term); Hume v. Conduitt, 76 Ind. 598.

But there must be an assumption of the right to give notice, and there must be some law authorizing this assumption. At all events, there must be color of right, and without a law authorizing notice there can be none. We approve, as fully as language can do, the doctrine of former decisions, that the legislature has ample authority to prescribe what the notice shall be. Johnson v. Lewis, 115 Ind. 490, 18 N. E. 7; Garvin v. Daussman, 114 Ind. 429, 16 N. E. 826, 5 Am. St. Rep. 637; Carr v. State, 103 Ind. 548, 3 N. E. 375; Hobbs v. Board, 103 Ind. 575, 3 N. E. 263.

We affirm, too, that whether the notice is by publication or by personal service, it will sustain jurisdiction, provided there is back of it some law providing for notice. While affirming these various propositions, we also affirm that, where individual property rights are affected, there must be provision for notice made by law before there can be a final and conclusive adjudication. Only the law can prescribe the form of the notice, and the law must provide for it. Where, therefore, individual rights are concerned, and the matter is one upon which a party is entitled to be heard, a proceeding conclusively and finally disposing of individual property rights will be void, unless founded upon a law providing for notice of some kind.[9] Where the

[9] That the requirement of notice will be implied, see Harlow v. Pike, 3 Greenl. (Me.) 438 (1825); also Corcoran v. Board of Aldermen of Cambridge, 199 Mass. 5, 85 N. E. 155, 18 L. R. A. (N. S.) 187 (1908). Moreover, see Detroit, etc., Ry. Co. v. Osborn, 189 U. S. 383, 391, 23 Sup. Ct. 540, 543, 47 L. Ed. 860 (1903): "The cause was submitted on petition and answer, and the petition alleged 'that notice was given by respondent [the commissioner of railroads] to relator and the Union Terminal Association, and the hearing had, at which relator's representative objected to the making of said order.' It is therefore not open to the plaintiff in error (the railway) to complain that the statute did not provide for notice." Also, see page 100, note.

matter to be decided is one of pure discretion, and the tribunal decides upon its own judgment, unaided by evidence, then notice is not essential. State v. Johnson, 105 Ind. 463, 5 N. E. 553; Fries v. Brier, 111 Ind. 65, 11 N. E. 958; Trimble v. McGee, 112 Ind. 307, 14 N. E. 83; Weaver v. Templin, 113 Ind. 298, 14 N. E. 600.

But in adding to property listed by the taxpayer, or in increasing the valuation put upon listed property by him, a board of equalization does not exercise arbitrary power or unrestricted discretion. On the contrary, it must be guided by the law and the facts, and has no right to add to the list of the taxpayer property he does not own, nor has it authority to increase the valuation of property without giving the taxpayer legal notice; thus affording him an opportunity to adduce evidence or furnish information. It is a serious matter to charge a person with fraudulently or falsely listing his property; and to add to his list, or to increase the valuation of property, imposes upon him a burden, for it deprives him of property in the form of money. That notice is required in all cases where individual property rights are involved, and the matter is not one of pure discretion, has been again and again decided by our own and other courts. Strosser v. City, 100 Ind. 443; Troyer v. Dyar, 102 Ind. 396, 1 N. E. 728; Jackson v. State, 103 Ind. 250, 2 N. E. 742; Johnson v. Lewis, 115 Ind. 490, 18 N. E. 7; Board v. Gruver, 115 Ind. 225, 17 N. E. 290, and cases cited. That the notice must be authorized by law is affirmed by many cases. The rule is thus stated in one case: "It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them a right to a hearing, and an opportunity to be heard." Stuart v. Palmer, 74 N. Y. 188, 30 Am. Rep. 289.

Judge Cooley, in speaking of the correction of tax lists, says: "It is a fundamental rule that in judicial or quasi judicial proceedings, affecting the rights of the citizen, he shall have notice, and be given an opportunity to be heard, before any judgment, decree, order, or demand shall be given and established against him. Tax proceedings are not in the strict sense judicial, but they are quasi judicial, and, as they have the effect of a judgment, the reasons which require notice of judicial proceedings are always present when the conclusive steps are to be taken." Cooley, Tax'n (2d Ed.) 363. An author who has recently written on the subject concludes his discussion by saying: "There is really but one logical and consistent position in the matter, and that is that a statute that does not provide for notice is invalid." Lewis, Em. Dom. § 368. A very thorough discussion of the question will be found in Johnson v. Railroad Co., 23 Ill. 202. We need not, however, look beyond our own reports, for our own decisions declare that the statute itself must provide for notice. Campbell v. Dwiggins, 83 Ind. 473; Jackson v. State, 104 Ind. 516, 3 N. E. 863; Fries v. Brier, 111 Ind. 65, 11 N. E. 958; Johnson v. Lewis, supra.

We said in Jackson v. State, supra, that "the notice must assume to

be such as the law requires, but, in order to repel a collateral attack, it need not be a valid notice"; and in Garvin v. Daussman, supra, we said: "It is without doubt essential to the validity of every law under which proceedings may be had for the taking of property, or to impose a burden upon it which may result in taking it, that the law make provision for giving some kind of notice, at some stage in the proceeding." The ultimate conclusion which we reach is that where a conclusive decision is authorized the statute itself must provide for notice, and secure it to the taxpayer, not as matter of favor, but as a matter of right.

We agree with the appellee's counsel that the board of equalization is not a judicial tribunal, in the strict sense of the term; but, while this is true, it is also true that it possesses functions of a judicial nature. Wilkins v. State, 113 Ind. 514, 16 N. E. 192. Judicial powers are, as we said in the case cited, lodged in the courts; and, where the Constitution distributes the judicial power, it can only be exercised by the tribunal named by the constitution, and constituted as the Constitution provides. Greenough v. Greenough, 11 Pa. 489, 51 Am. Dec. 567; Chandler v. Nash, 5 Mich. 409; Alexander v. Bennett, 60 N. Y. 204; Van Slyke v. Insurance Co., 39 Wis. 390, 396, 20 Am. Rep. 50; Gibson v. Emerson, 7 Ark. 172; Gregory v. State, 94 Ind. 384, 48 Am. Rep. 162; Shoultz v. McPheeters, 79 Ind. 373.

But while we hold that the authority of the board of equalization is not judicial, yet we also hold that it is in its nature so far judicial as to require notice to one whose individual rights are directly affected. We are inclined to concur with appellee's counsel that the judgment of the board is conclusive, but to that proposition we add that it is only so where there is jurisdiction, and that notice to one whose list is to be added to or whose valuation is to be increased is essential to give jurisdiction. School Dist.'s Appeal, 56 Pa. 315; Osborn v. Inhabitants, 6 Pick. (Mass.) 98; Hughes v. Kline, 30 Pa. 227; Macklot v. City, 17 Iowa, 379; Deane v. Todd, 22 Mo. 90; McIntyre v. Town, 43 Wis. 620.

The fact that the judgment is conclusive supplies a strong reason for holding that the taxpayer should have an opportunity to be heard, and that he should be heard before his list or his valuation is set aside or changed. The power to hear and determine, where there is a question admitting of controversy, and the entire matter is not one of absolute and arbitrary discretion, implies that, in reason and justice, the law should, by making provision for notice, give the parties an opportunity to be heard; for otherwise it cannot be justly said that there is due process of law.

Thus far we have proceeded upon the assumption that the statute does not provide for notice to the individual taxpayer whose list is to receive additions, or whose valuation is to be increased, and, if this assumption cannot be made good, our reasoning is invalid. It is, however, not difficult to prove the validity of our assumption. The

statute itself supplies the requisite proof. It does provide notice sufficient for two classes of judgments, but for no others. It provides for notice sufficient as to all general changes in the levy, and sufficient as to all who have complaints to make, and over these matters jurisdiction arises when the notice is given as the statute directs. But there is no provision for notice to the individual taxpayer whose list is to be added to or whose valuation is to be increased. Its provisions on the subject of notice are these: "Two weeks' previous notice of the time, place, and purpose of such meeting shall be given by the county auditor in some newspaper of general circulation, printed and published in the county; or, if no newspaper be published in the county, then by posting up notices in three public places in each township in the county." Section 6397, Rev. St. 1881.

This notice, it is obvious, cannot require every taxpayer in the county to be in attendance at the meeting of the board to see that no additions are made to his list. As additions to his list affect him as an individual, he is entitled to notice as an individual. He is not within the scope of the statute, since he is not bound to assume that there will be any change in the verified list given by him to the assessor. His rights are distinct from those of the public, and from the rights of those persons who have complaints to make. Those who believe themselves wronged by having property listed to them that they do not own, or who believe that their property has been overvalued, are actors; they move, they take the initiatory step, and they must come before the board under the notice prescribed by the statute. But with the taxpayer whose assessment is to be increased it is otherwise. He is not the actor; he does not take the initiatory step; but, on the contrary, he is passive and inactive until brought before the board by notice. He is not under any legal obligation to move until notice comes to him. Indeed, he cannot move if he is content with his list and assessment, for there is nothing for him to do. The taxpayer who has a complaint to make occupies a position very similar to that of the plaintiff in an ordinary action, while the person whose taxes are to be increased is in a position very like that of a defendant. We must hold that a taxpayer is entitled to notice, or else we must hold that he is bound, at his peril, to keep vigilant watch of the proceedings, lest property he does not own be assessed to him, or the valuation of his listed property be increased. In the absence of notice to him as an individual, he is not bound to exercise any such vigilance. Claybaugh v. Railway Co., 108 Ind. 262, 9 N. E. 100; Munson v. Blake, 101 Ind. 78.

It would be almost as unjust to compel such a taxpayer to be constantly on the watch during the meeting of the board as to compel a defendant who has failed to pay a note, violated a covenant, or committed a trespass to watch the dockets of the court during term time. The notice does no more than inform the public that the board will be in session at a designated time and place, and no one is bound to act

upon the notice further than to present complaints or resist general changes in the levy. Certainly no one is bound to know that a complaint will be preferred against him affecting his individual rights. If one taxpayer is bound to keep watch during the session of the board, so are all, and the result would be that the meetings of the board would be thronged with taxpayers, or else their rights be at the mercy of the board. The organic law to which all statutes must yield does not intend that such a thing shall ever occur, for it requires notice to each person whose individual property rights may become the subject of investigation and final adjudication. This is a fundamental principle, ruling all the departments of government. A decision of a judicial nature, conclusively deciding upon individual property rights of a citizen, and imposing a burden upon him, can only be given in a proceeding of which, before a final and conclusive judgment is reached, the citizen has notice, for without such notice there cannot be due process of law. A decision not final, but subject to review, may not necessarily require notice; but a final decision must be based on a notice provided for by law.

Judgment reversed, with instructions to overrule the demurrer to the complaint.[10]

HULING v. EHRICH.

(Supreme Court of Illinois, 1899. 183 Ill. 315, 55 N. E. 636.)

Error to circuit court, Kankakee county.

Suit by Truman Huling against F. C. Ehrich. Bill dismissed, and complainant brings error. Reversed.

CARTWRIGHT, C. J. Truman Huling, plaintiff in error, is a resident and taxpayer of Kankakee township. In the year 1897 he made and delivered to the assessor a list of his personal property in compliance with the statute, which included $5,000 in moneys and credits. This list was accepted by the assessor, and the total value, as fixed by the assessor and placed in his books, was $5,595, including said amount of moneys and credits. The town board of review met June 30, 1897, and increased this assessment from $5,595 to $10,595 without any notice to Huling, and without his knowledge or consent, and made this record of their action: "The assessment of Truman Huling is raised to the amount of $10,000 on his moneys and credits, which the board deems to be about right." On the assessments, so increased, of $10,595, a tax of $1,100.83 was levied.

Huling first learned of the increase when the collector attempted to collect the tax, and he then tendered $581.33, the proportionate amount of the tax on the assessment as first made by the assessor, and filed his

[10] Contra: State v. New Lindell Hotel Co., 9 Mo. App. 450 (1881).

bill against F. C. Ehrich, the collector, defendant in error, to enjoin the collection of $519.50, the portion of the tax levied on the increase of $5,000 made by the town board. The bill was answered, and the answer admitted that the tax was extended on the valuation as made by the board of review, and admitted the tender, but denied that the board of review acted without notice, and averred that the valuation was not inequitable. On a hearing, the facts alleged in the bill were proved, but the court dismissed the bill, at complainant's cost, for want of equity.

The township board of review was only authorized to act and raise complainant's assessment after giving notice in writing to him or his agent. Rev. St. c. 120, § 86. He made out and delivered to the assessor a list of his taxable property, which was accepted by the assessor. If it was proposed to increase his assessment, he was entitled to a hearing, and an opportunity to show the facts, and the board had no power, without notice to him, to increase such assessment. He had no knowledge of the increase until the collector attempted to collect the tax. The board had no jurisdiction to reassess his property, and in such case equity will restrain the collection of the illegal tax on the ground that the assessment is void as to the increase. Cleghorn v. Postlewaite, 43 Ill. 428; Darling v. Gunn, 50 Ill. 424; McConkey v. Smith, 73 Ill. 313; Bank v. Cook, 77 Ill. 622; Camp v. Simpson, 118 Ill. 224, 8 N. E. 308.

It is argued that, since complainant asked the aid of a court of equity and was bound to do equity, he must fail, unless he showed that the assessment was raised above the fair valuation of all his taxable property. He tendered all the tax that had been levied by authority of law, and that is all equity would require him to pay.

It is also urged that the court properly denied relief, because no witness testified that the amount tendered was the proportionate share of the tax levied on the assessor's valuation. It is said that the court could not determine what proportion of the tax was illegal, because no witness testified to the amount. It was not necessary that there should be any such proof. The question of the proportionate amount of the tax levied on a valuation of $10,595, arising from the original assessment of $5,595 and the increase of $5,000, was a mere matter of computation, and not a fact to be proved by witnesses.

The decree of the circuit court is reversed, and the cause remanded, with directions to enter a decree in accordance with the prayer of the bill. Reversed and remanded.

SECTION 20.—IN THE EXERCISE OF THE POLICE POWER

WAYE v. THOMPSON.

(Supreme Court of Judicature, Queen's Bench Division, 1885. L. R. 15 Q. B. Div. 342.)

Case stated by justices under St. 20 & 21 Vict. c. 43, on the hearing at petty sessions of an information preferred by the appellant, an inspector of nuisances, against the respondent, a butcher, under St. 38 & 39 Vict. c. 55, § 117.[11]

Upon the hearing[12] the following facts were proved, viz.: That the meat was in the possession of and exposed for sale by the respondent, and was intended for the use of man; that it was seized by the appellant on the 21st of October, 1884, and on the same day taken before Thomas Barlow Mafsicks, Esq., a justice of the peace, and it appearing to him on an ex parte statement not on oath that such meat was diseased, unsound, unwholesome, and unfit for the food of man, he did thereby condemn the meat, and ordered the same to be destroyed or so disposed of to prevent the same from being exposed for sale or used for the food of man. On the following day, however, the said justice, at the request of the respondent, directed the appellant not to destroy the carcase of meat until the owner could have it inspected by a

[11] English Public Health Act, 1875, 38 Vict. c. 55:

"Sec. 116. Any medical officer of health or inspector of nuisances may at all reasonable times inspect and examine any animal, carcase, meat, poultry, game, flesh, fish, fruit, vegetables, corn, bread, flour, or milk exposed for sale, or deposited in any place for the purpose of sale, or of preparation for sale, and intended for the food of man, the proof that the same was not exposed or deposited for any such purpose, or was not intended for the food of man, resting with the party charged; and if any such animal, carcase, meat, poultry, game, flesh, fruit, vegetables, corn, bread, flour or milk appears to such medical officer or inspector to be diseased or unsound or unwholesome, or unfit for the food of man, he may seize and carry away the same himself or by an assistant, in order to have the same dealt with by a justice.

"Sec. 117. If it appears to the justice that any animal, carcase, meat, poultry, game, flesh, fish, fruit, vegetables, corn, bread, flour, or milk so seized is diseased or unsound or unwholesome or unfit for the food of man, he shall condemn the same, and order it to be destroyed or so disposed of as to prevent it from being exposed for sale or used for the food of man; and the person to whom the same belongs or did belong at the time of exposure for sale, or in whose possession or on whose premises the same was found, shall be liable to a penalty not exceeding twenty pounds for every animal, carcase, or fish, or piece of meat, flesh, or fish, or any poultry or game, or for the parcel of fruit, vegetables, corn, bread, or flour, or for the milk so condemned, or at the discretion of the justice, without the infliction of a fine, to imprisonment for a term of not more than three months."

[12] It was stated by counsel during argument that a summons had issued against the respondent, calling on him to show cause why the penalty under section 117 should not be inflicted.

veterinary surgeon, which inspection was accordingly made by witnesses on respondent's behalf.

The appellant called witnesses to prove that the meat was diseased, unsound, unwholesome, and unfit for the food of man. The respondent thereupon proposed to call the witnesses who by the permission of the said justice had inspected the meat on his, the respondent's, behalf, and also other witnesses, some of whom had seen the cow before it was slaughtered and after it had been dressed, and others who had seen other portions of the carcase of the cow from which the alleged diseased meat had been cut, some before and others after the same had been condemned by the said justice (including medical and veterinary men) and other witnesses who alleged they had partaken of meat from the same animal. This testimony was objected to by the appellant on the following grounds:

(1) That the question of the meat being diseased, unsound, unwholesome, and unfit for the food of man had been already adjudicated upon and decided in the affirmative by a justice of the peace on an ex parte proceeding, evidence of which had been presented to the justices.

(2) The evidence to the contrary should not be admitted by the justices.

(3) That the evidence furnished to them by the appellant was sufficient to justify a conviction of the respondent under the 117th section of the Public Health Act, 1875, for the offences alleged against him.

The justices overruled the objections and heard the evidence of the defendant's witnesses, which satisfied the justices that the meat was not diseased, but was wholesome, sound, and fit for the food of man, and the justices gave their decision against the appellant, and ordered him to pay the respondent's costs.

The question upon which this case was stated for the opinion of the court was whether the justices should have permitted evidence to be given by the respondent as to the state and condition of the said meat at the time it was ordered to be destroyed by the said Thomas Barlow Mafsicks.[13]

Manisty, J. (after stating the facts as they appeared in the case). The information laid was no doubt the groundwork of a summons, and we are told that the practice is to issue a summons calling on the respondent to shew cause why he should not be sent to prison or fined. On the hearing of that matter—and not of the information as alleged in the case, which is imperfectly stated—the magistrates were called upon to decide whether or not the meat was fit for human food, and the question is whether they were justified in admitting the evidence as to the state of the meat.

The cases of White v. Redfern, 5 Q. B. D. 15, and Vintner v. Hind, 10 Q. B. D. 63, do not assist us. White v. Redfern decides that a

[13] The arguments of counsel are omitted.

justice may, without hearing evidence on behalf of the butcher, condemn the meat; but that does not help us in the present question, viz., when a man is in peril of being sent to prison or fined, is he to be heard or not? It is contrary to first principles to say that a man can be sent to prison or convicted without being heard. The respondent was not heard, and it was not necessary that he should be heard, when the case was before the magistrate in the first instance. That magistrate was satisfied that it was made to appear to him the meat was diseased and he condemned it. If the respondent is not allowed to give evidence when summoned to show cause why he should not be sent to prison or fined, he has not an opportunity of being heard at all, and it would be the first case I ever knew of a man being subject to imprisonment or fine, without having been heard. I am clearly of opinion that the magistrates were right in receiving the evidence.[14]

CITY OF PHILADELPHIA v. SCOTT.

(Supreme Court of Pennsylvania, 1876. 81 Pa. 80, 22 Am. Rep. 738.)

AGNEW, C. J.[15] * * * The only question, therefore, remaining is whether the act has furnished a constitutional mode of proceeding, to bind the owner of the land to the payment of the expense of the repairs. The following are all its material provisions: "It shall be the duty of the commissioners * * * upon complaint by any person owning property fronting upon such river, or liable to be damaged by the overflow of the same, that said banks, or any part thereof, are out of repair, or in an unsafe or insecure condition, to give notice forthwith to the owner or owners of such part or portion to repair the same within forty-eight hours after such notice, * * * and in case such owner or owners shall neglect or refuse to cause such repairs to be made within the time aforesaid * * * it shall be the duty of such commissioners to cause the said banks to be well and thoroughly repaired, etc., and they shal enter the same as a lien against the said premises and the owners thereof." The law then provides for a scire facias to enforce payment, and declares "that upon the trial of such action the said defendant shall only be permitted to aver and prove in defence that the lien, in whole or in part, has been paid since the same was filed, and that all matters necessary for a recovery on part of the plaintiffs shall be considered as proved by the production of the lien and scire facias thereon at the time of trial."

The law, it will be seen, provides no mode of determining the necessity for repair, not even the judgment of the commissioners, for they

[14] See Cooper v. Wandsworth Board of Works, 14 C. B. (N. S.) 180 (1863), post, p. 252.

See, also, Vestry of St. John's v. Hutton, [1897] 1 Q. B. 210.

[15] Only a portion of the opinion of Chief Justice Agnew is printed.

are bound, on complaint, forthwith to give notice, and the owner is bound, within forty-eight hours after notice, to make the repairs, and, on default, the commissioners shall do the work at his expense. Whether the bank actually needs repair, or the injury complained of, if any, is a total destruction of the bank, demanding reconstruction, or a mere repair, which the owner is bound to do, is not to be ascertained before the liability is settled upon him. He is to pay at all events, and this case itself is evidence of the necessity of the provision to determine the nature of the thing complained of, for we have a finding of $6,145.66 against the defendant, a sum which looks more like the price of reconstruction than of repair. Repair is all this law provides for. Perhaps some allowance might be made, and the clause requiring the commissioners "to cause the banks to be well and thoroughly repaired" might be interpreted as inferentially requiring an examination and decision upon the duty of repairing before they proceeded to do it. But we are met by the proviso, which forbids any defence but payment. There can be no inquiry into the fact whether the commissioners actually did determine it to be a case of necessary repair, whilst they may have gone on different grounds. An act which subjects a man to a penalty of over $6,000 for not doing the work for which complaint was lodged should clearly devolve the duty of decision upon some impartial tribunal.

The case of Kennedy v. Board of Health, 2 Pa. 366, is not in point. There the twenty-seventh section of the act of 29th of January, 1818, grounds the right of the board to abate the nuisance in express words in the opinion of the board that the nuisance tends to endanger the health of the citizens. This is an essential prerequisite, and the citizen is absolutely entitled to the judgment of the board on this point. This feature is at the foundation of the decision. In that case the constitutional question was not raised. But here the learned judge below was of opinion that the act of 1848 does not furnish due process of law, within the protection of the ninth section of the Declaration of Rights, that no one shall be "deprived of his life, liberty or property unless by the judgment of his peers or the law of the land." In this view we concur. What is meant by the law of the land has been fully discussed in Craig v. Kline, 65 Pa. 413, and the cited authorities. I shall not enlarge upon it. Suffice it to say, the law must furnish some just form or mode in which the duty of the citizen shall be determined before he can be visited with a penalty for nonperformance of the alleged duty. The proceeding must be in its nature judicial, though it is not necessary it should be before one of the ordinary judicial tribunals of the state.

Judgment affirmed.

HUTTON et ux. v. CITY OF CAMDEN.

(Court of Errors and Appeals of New Jersey, 1876. 39 N. J. Law, 122, 23 Am. Rep. 203.)

BEASLEY, C. J.[16] * * * From an inspection of the bill of exceptions, it appears that, at a meeting of the board of health on the 29th of December, 1874, the following resolution was passed, to wit: "Moffet moved that the lot of Mr. Hutton, on Federal street, above Broadway, be declared a nuisance, and he (Hutton) be notified to fill said lot up to grade. Agreed to." On the 7th of the following January the following notice was served: "Mr. D. W. J. and Mary Hutton—You are hereby notified by the board of health of the city of Camden to fill up to grade your lot, situated on Federal street, forty feet, southeast corner Broadway and Federal street, within ten days from date." This order not being complied with, the city did the work, at a cost of $213.30, and this suit was brought by the city to obtain reimbursement for this outlay from the plaintiffs in error. * * *

. From the history of the proceedings, it appears that the before-cited resolution of the board of health was regarded, and was adjudged at the trial, to be absolutely conclusive of the question embraced in its decision. The board had agreed to the proposition that the lot of the plaintiffs was a nuisance, and that ended the matter, for all the purposes of the suit then trying. The resolution was looked upon as a judgment that was just as final as would have been the judgment of the Supreme Court of the state. It mattered nothing that the person whom the resolution was to affect had not been notified of the action about to be taken affecting his interest, and had, therefore, no opportunity of being heard; nor that it affirmatively appeared, on the plaintiffs' own case, that no public nuisance, in point of fact, had existed on the property in question; or that a body of five persons had pronounced judgment, without evidence, on the representation of two of its members; or that such board had pronounced the lot itself to be a nuisance, without specifying in what respect, so as to enable the owner to remove whatever was objectionable; or that the order, instead of being to abate a designated nuisance, leaving it to the lot owner to abate it in his own fashion, had directed the lot to be filled in to grade—yet, notwithstanding all these omissions and errors, which were obviously so flagrant as to leave in the action of this tribunal not the faintest semblance, either in form or substance, of a proceeding in an ordinary court of justice, was pronounced to be, in point of law, final, and to import absolute verity.

But this view of the efficacy to be given to this decision of the board of health, even if such board is to be regarded as a special tribunal, authorized by the Legislature to pass upon the matter adjudged by it, is, I think, manifestly erroneous. It is not within the competence of

[16] Only a part of the opinion of Beasley, C. J., is printed.

legislation in this state to authorize any tribunal to render a judgment against the person or property of a citizen without a notice, and an opportunity afforded him to be heard. If the charter of the city of Camden had declared that the board of health should have the power of rendering decisions similar to the present one, and under the same conditions of procedure, such provision would have been entirely nugatory. A judgment in any court, without in any wise summoning the defendant, would be void, and not merely voidable. It is true that where the proceeding is in any of our domestic tribunals, whose action is regulated by the common law, it will not be admissible to show the fact, in a collateral way, that the sentence was rendered against a defendant who was not duly in court; the rule, introduced from the civil law, being, "res judicata pro veritate accipitur." And this estoppel springs from the circumstance that in courts so constituted there is a remedy provided against errors of every description. But this rule, which this [thus] conclusively presumes, that courts of this character had jurisdiction by means of due citation over the person of the suitor, does not apply to inferior and special tribunals not being courts of record, and whose methods of action are not in accordance with those of the common law. Whenever the act of such a judicial body comes in question, its jurisdiction over the particular case adjudged is a mere matter in pais, and is open to inquiry by evidence. * * *[17]

METROPOLITAN BOARD OF HEALTH v. HEISTER (two cases).

HEISTER v. METROPOLITAN BOARD OF HEALTH (two cases).

(Court of Appeals of New York, 1868. 37 N. Y. 661.)

The above four cases were submitted to the General Term of the Supreme Court in the First Judicial District, by the parties, under the Code, for the purpose of procuring decisions upon questions that had arisen between them, and which are also involved in several other pending suits.

In case No. 1, the board claims to recover the penalty given by the statute against one who has violated its order. The defendant, when the order was made, was engaged as a butcher, in the business pursuit of "slaughtering cattle at his slaughterhouse, No. 95 Fourth street, in the city of New York, which said slaughterhouse was in the densely populated portions of said city, and was upon a paved street." The board of health, the plaintiff, on said day, as contemplated by the first subdivision of the fourteenth section of the metropolitan health law (Laws 1866, c. 14), "took and filed among its records what (the same

[17] See Weil v. Ricord, 24 N. J. Eq. 169 (1851).

being written evidence) the plaintiff regarded as sufficient proof to authorize its declaration that the same (the using of said slaughterhouse for said pursuit) was dangerous to health, and was also a public nuisance." Said proof "consisted of statements of competent persons, under oath, that said business endangered the health of the people of the vicinity, was offensive to their senses, and rendered their life uncomfortable, and of facts sustaining such statements." The board thereupon "ordered said business to be discontinued, and said nuisance to be abated," but directed that the order should not be executed till the same had been served on the defendant, and he had been afforded an opportunity to be heard. This order was duly served on the defendant, and it is admitted "that the defendant might have applied for, and have had, the opportunity and hearing contemplated in said section, but did not, at any time, apply for the same, but declined or omitted so to do; that the plaintiff waited more than three days, as provided by law, after such service, and before commencing the execution of said order." And thereafter a final order was in due course made by the board, which is set out at length. The police were directed to execute this order, "and the execution of the order was duly commenced"; and "all doings and proofs and order of said board in the premises appear among its archives, as the law provides." The submission to the court below was formally made by both parties. The defendant's theory was sustained, and judgment ordered in his favor, and an appeal has been taken to this court by the plaintiffs. * * *

Case No. 4 arises on the same state of facts, and relates to the same order, as case No. 1; but it is a suit by the butcher against the board to obtain an injunction to prevent the board enforcing its order, forbidding slaughtering at the place to which the order relates. The case differs from No. 1 only at the point where the plaintiff states his claims and demands his remedy. The board found the same facts as to the business being "dangerous to health," made the same order, and gave the plaintiff the same opportunity for a hearing, which he declined, as in case No. 1. It appears that the record of the decision and proceedings of the board are preserved among its records. The decision of the General Term was in favor of Heister, and the board of health bring their appeal to this court.

HUNT, C. J.[18] * * * Before leaving the consideration of this constitutional objection, it ought, perhaps, to be observed that the act provides for notice to the party affected, before the judgment finally passes against him. In substance, the board, upon the evidence before it, determine that a prima facie case exists requiring their action. In the present instance, after such preliminary determination made, notice was given to Heister of what had been done, and that he could be heard upon the subject, with his witnesses, at a time designated. This gave the same protection to all his rights as if notice had been served upon

[18] Only a portion of the statement and of the opinion of Hunt, C. J., is printed.

him before any preliminary proceedings had been taken. He refuses to litigate before the board the question whether his pursuit is dangerous to the public health, but places himself upon their want of power over the subject. He cannot complain now that their judgment upon the facts is to be held conclusive upon him.

PEOPLE ex rel. COPCUTT v. BOARD OF HEALTH OF CITY OF YONKERS.

(Court of Appeals of New York, 1893. 140 N. Y. 1, 35 N. E. 320, 23 L. R. A. 481, 37 Am. St. Rep. 522.)

Appeal from Supreme Court, General Term, Second Department.

Certiorari by the People of the State of New York on the relation of John Copcutt to review the action of the Board of Health of the City of Yonkers in enacting an ordinance declaring certain mill ponds owned by relator in such city to be public nuisances, and directing the issuance of a warrant authorizing the proper officer to remove and abate the same. From a judgment of the General Term (71 Hun, 84, 24 N. Y. Supp. 629) affirming the proceedings of the board, relator appeals. Affirmed.

The other facts fully appear in the following statement by EARL, J.:

The Nepperhan river is a small stream of water flowing through the city of Yonkers, and across the stream there were several dams, to furnish power to drive machinery. Much complaint having been made to the board of health that these dams created nuisances, the members of the board resolved to hold a meeting on the 27th day of March last to consider the condition of the dams, and they ordered notice to be given to the owners of the dams to show cause at that time why the dams should not be removed. In pursuance of this resolution, notice was served upon the relator, who owned or was interested in two of the dams and the ponds and water powers thereby created, called the "5th" and "6th" water powers, and he appeared before the board at the time and place in person and by counsel, and he gave evidence tending to show that the two dams were not nuisances, and did not create nuisances; and there was also evidence in conflict with the case made by him. After hearing the evidence, the board made its determination that the dams were nuisances, and ordered them removed. The relator then instituted this proceeding by certiorari to review this determination. The board made return to the writ, setting forth all its proceedings and the evidence taken by it, and stated in its return that its determination and action were based "not only upon testimony given by the witnesses, but that the determination of the said board of health, and the members thereof, has been based mainly upon the individual knowledge and experience of the members of said board of health concerning the ponds in the Nepperhan stream, and the

condition thereof, inasmuch as each member of the board of health, in performance of the duties imposed by law, has personally inspected and has examined and inquired into the condition of said ponds and of said stream, and that the conclusions reached by this board have been reached and depend largely upon personal knowledge and experience of the individual members of this board, and for this reason it is apparent that this board cannot certify to and reproduce before this court all of the proofs, nor all of the grounds of the determination of said board, nor any considerable part thereof." Upon the return and the papers filed therewith the general term affirmed the action of the board, and then the relator appealed to this court.

EARL, J.[19] (after stating the facts). The disposition of this case turns largely upon the effect and the construction of the statutes constituting the board of health, and defining its powers and duties, and we will therefore first give attention to the statutes.

By chapter 184 of the Laws of 1881 (an act to revise the charter of the city of Yonkers) it is provided in title 9 that the mayor, the supervisor, the president of the common council, the president of the board of water commissioners, the president of the board of police, and the health officer shall constitute the board of health of the city; and the board is given power, among other things, "to suppress, abate, and remove any public nuisance detrimental to the public health," and, in addition to other remedies which it may possess by law, it is empowered to issue its warrant, whenever necessary, to the sheriff of the county of Westchester, or to any policeman of the city, authorizing and commanding him to forthwith suppress, abate, and remove such public nuisance, at the expense of the lot whereon the nuisance exists, and of the owner thereof, to be enforced and collected as in the act provided. It is further provided that, in addition to the powers expressly granted in the act, the board shall "have and exercise all the powers now or at any time hereafter conferred upon boards of health in cities by any general law;" and it is authorized to make ordinances, rules, and regulations to carry into effect its powers, and to enforce observance of them by penalties, and by action instituted in its name to recover penalties and to restrain and abate the nuisance.

By chapter 270 of the Laws of 1885 (the general act for the preservation of the public health) it is provided that the board of health in any city of the state, except the cities of New York, Brooklyn, and Buffalo, shall have the power, and it shall be its duty, "to receive and examine into the nature of complaints made by any of the inhabitants concerning nuisances or causes of danger or injury to life and health within the limits of its jurisdiction; to enter upon or within any place or premises where nuisances or conditions dangerous to life and health are known or believed to exist, and by appointed members or persons to inspect and examine the same, and all owners, agents and occupants

[19] A portion of the opinion is omitted.

shall permit such sanitary examinations, and said board of health shall furnish said owners, agents and occupants a written statement of results or conclusions of such examinations; and every such board of health shall have power, and it shall be its duty, to order the suppression and removal of nuisances and conditions detrimental to life and health found to exist within the limits of its jurisdiction," and "to make, without the publication thereof, such orders and regulations in special and individual cases, not of general application, as it may see fit, concerning the suppression and removal of nuisances." It is further authorized to abate nuisances, and to impose penalties for the violation of its orders and regulations, and the violation of them is also made a misdemeanor, and it may commence actions to restrain and abate nuisances, and to enforce its orders and regulations.

A careful examination of the two acts shows that there is no provision for a hearing before the board on the part of any person who is charged with maintaining a nuisance upon his premises. The right to such a hearing is not expressly given, and cannot be implied from any language found in either act, or from the nature of the subjects dealt with in the acts. Boards of health and other like boards act summarily, and it has not been usual anywhere to require them to give a hearing to any person before they can exercise their jurisdiction for the public welfare. The public health might suffer or be imperiled if their action could be delayed until a protracted hearing could be brought to a termination. There is no provision in the acts for calling or swearing witnesses, and there is no general law giving them power to do so. Section 843 of the Code of Civil Procedure[20] is not applicable to such a case, for the reason that the board is not authorized by law to hear testimony or take the oral examination of witnesses.

The question may be asked, how can these provisions conferring powers upon boards of health to interfere with and destroy property, and to impose penalties and create crimes, stand with the Constitution, securing to every person due process of law before his property or personal rights or liberty can be interfered with? The answer must be that they could not stand if we were obliged to hold that the acts referred to made the determinations of the board of health as to the existence of nuisances final and conclusive upon the owners of the premises where they are alleged to exist. Before such a final and conclusive determination could be made, resulting in the destruction of property, the imposition of penalties and criminal punishments, the party proceeded against must have a hearing, not as matter of favor, but as matter of right; and the right to a hearing must be found in the acts. Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 239. As we have said, there is no provision of law giving any party a right to a judicial hearing before these boards, and there is no provision making their determination final. If the decisions of these boards were final and conclusive, even after a hearing, the citizen would in many cases

[20] Authorizing the administration of oaths by certain officials.

hold his property subject to the judgments of men holding ephemeral positions in municipal bodies and boards of health, frequently uneducated, and generally unfitted to discharge grave judicial functions. Boards of health, under the acts referred to, cannot, as to any existing state of facts, by their determination make that a nuisance which is not in fact a nuisance. They have no jurisdiction to make any order or ordinance abating an alleged nuisance unless there be in fact a nuisance. It is the actual existence of a nuisance which gives them jurisdiction to act. Their acts declaring nuisances may be presumptively valid until questioned or assailed, for the same reasons which give presumptive legality to the acts of official persons under the maxim, "omnia præsumuntur legitime facta donec probetur in contrarium."

What operation, then, does the order or ordinance of the board of health have under these acts? The nuisance actually existing, and the jurisdiction having been regularly exercised, the order or ordinance has all the operation and effect provided in the act, and the persons who abate the nuisance have the protection which they would not have as private persons abating, not a private nuisance, especially injurious to them, but a public nuisance injurious to the general public. It may be said that if the determination of a board of health as to a nuisance be not final and conclusive, then the members of the board, and all persons acting under their authority in abating the alleged nuisance, act at their peril; and so they do, and no other view of the law would give adequate protection to private rights. They should not destroy property, as a nuisance unless they know it to be such, and, if there be doubt whether it be a nuisance or not, the board should proceed by action to restrain or abate the nuisance, and thus have the protection of a judgment for what it may do.

It may further be asked, what, under this view of the law, is the remedy of the owner of property threatened with destruction or actually destroyed as a nuisance? He may have his action in equity to restrain the destruction of his property if the case be one where a court of equity under equitable rules has jurisdiction,[21] or he may bring a common-law action against all the persons engaged in the abatement of the nuisance to recover his damages, and thus he will have due process of law; and, if he can show that the alleged nuisance does not in fact exist, he will recover judgment, notwithstanding the ordinance of the board of health. Thus the views we take of these acts and similar acts conferring powers upon local officers to proceed summarily upon their own view and examination furnish adequate protection to boards of health, to the public, and to property owners, and, while these views are not supported by all the decided cases upon the subject, they have the support of the best reasons and of ample authority.

In Cooley's Constitutional Limitations (5th Ed.) at page 722, in a note, the learned author, speaking of boards of health, says: "Though

[21] See Golden v. Department of Health, 21 App. Div. 420, 47 N. Y. Supp. 623 (1897).

they cannot be vested with authority to decide finally upon one's right to property, where they proceed to interfere with it as constituting a danger to health, yet they are vested with quasi judicial power to decide upon what constitutes a nuisance, and all presumptions favor their actions." And again, at page 742, in a note, citing authorities, he says: "Whether any particular thing or act is or is not permitted by the law of the state must always be a judicial question, and therefore the question what is and what is not a public nuisance must be judicial, and it is not competent to delegate it to local legislative or administrative boards. The local declaration that a nuisance exists is, therefore, not conclusive, and the party concerned may contest the fact in the courts."

Dillon, in his work on Municipal Corporations (4th Ed.) § 374, says the authority to prevent and abate nuisances and its summary exercise "may be constitutionally conferred on the incorporated place, and it authorizes its council to act against that which comes within the legal nature of a nuisance; but such power conferred in general terms cannot be taken to authorize the extrajudicial condemnation and destruction of that as a nuisance which in its nature, situation, or use is not such."

In Wood's Law of Nuisances (section 740) it is said that, where the public authorities abate a nuisance under authority of a city ordinance, "they are subject to the same perils and liabilities as an individual if the thing abated is not in fact a nuisance. * * * It would, indeed, be a dangerous power to repose in municipal corporations to permit them to declare by ordinance or otherwise anything a nuisance which the caprice or interests of those having control of its government might see fit to outlaw, without being responsible for all the consequences; and, even if such power is expressly given by the Legislature, it is utterly inoperative and void, unless the thing is in fact a nuisance, or was created or erected after the passage of the ordinance, and in defiance of it."

In Yates v. Milwaukee, 10 Wall. 497, 19 L. Ed. 984, Mr. Justice Miller said: "It is a doctrine not to be tolerated in this country that a municipal corporation without any general laws, either of the city or the state, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property of the city at the uncontrolled will of the temporary local authorities."

In Hutton v. City of Camden, 39 N. J. Law, 122, 23 Am. Rep. 203, it was held that the action of the board of health could not determine conclusively that a nuisance exists, and that such a conclusive determination could be made only in a regular course of law before an established court of law or equity.

In Underwood v. Green, 42 N. Y. 140, the action was to recover the value of dead hogs removed under the direction of the city sanitary inspector, an officer clothed with judicial discretion, and acting under a

city ordinance declaring that all dead animals "be forthwith removed and disposed of by removal beyond the limits of the city or otherwise, so as most effectually to secure the public health"; and it was held that it must be shown, in order to justify the act, that the dead hogs were or would become in some way dangerous or deleterious to public health.

The following are also instructive authorities upon the same subject: Mayor, etc., of New York v. Board of Health, 31 How. Prac. 385; Clark v. Mayor, etc., 13 Barb. 32; Rogers v. Barker, 31 Barb. 447; Coe v. Schultz, 47 Barb. 64; Lawton v. Steele, 119 N. Y. 226, 23 N. E. 878, 7 L. R. A. 134, 16 Am. St. Rep. 813.

The result of these authorities is that whoever abates an alleged nuisance, and thus destroys or injures private property, or interferes with private rights, whether he be a public officer or private person, unless he acts under the judgment or order of a court having jurisdiction, does it at his peril; and when his act is challenged in the regular judicial tribunals it must appear that the thing abated was in fact a nuisance. This rule has the sanction of public policy, and is founded upon fundamental constitutional principles.

The way is now clear to the disposition of this case. The board of health did act, and had a right to act, upon its own inspection and knowledge of the alleged nuisance. It was not obliged to hear any party. It could obtain its information from any source and in any way, and hence its determination upon the question of nuisance is not reviewable by certiorari. People v. McCarthy, 102 N. Y. 630, 8 N. E. 85. * * *

Our conclusion, therefore, is that the judgment of the general term should be affirmed, with costs. All concur.[22]

[22] FINCH, J., in Board of Health of City of Yonkers v. Copcutt, 140 N. Y. 12, 35 N. E. 443, 23 L. R. A. 485 (1893), an action to recover a penalty for a violation of an ordinance of the board of health, said:

"The appellant also objects that the ordinance, which was directed against him specially, and affected his property rights, was invalid, because passed without notice to him and an opportunity to be heard. In another phase of this case, coming to us on certiorari for a review of the action of the board, we have decided that a hearing was not necessary, because the question of nuisance, or not, lies at the foundation of the jurisdiction, and the party proceeded against may always try that vital and decisive question in the courts, and is not foreclosed by the order made. This case well illustrates the doctrine in actual operation. The plaintiff did not rely on its orders or ordinances alone, or the presumptions which they raised, but proceeded to allege and prove that the dam and pond were a public nuisance. The defendant took issue upon that, and the battle was fought out over that question. The defendant has had his day in court, ample and abundant chance to be heard, better and more complete than any hearing which the board could give. But we have already decided the question adversely to the defendant's contention, and nothing needs to be added to the discussion which it has received."

See Harrington v. Board of Aldermen of Providence, 20 R. I. 233, 38 Atl. 1, 38 L. R. A. 305 (1897); Hartman v. Wilmington, 1 Marv. (Del.) 215, 41 Atl. 74 (1894).

After an order has been made, notice must be given to the person affected

HEALTH DEPARTMENT OF CITY OF NEW YORK v. RECTOR, ETC., OF TRINITY CHURCH.

(Court of Appeals of New York, 1895. 145 N. Y. 32, 39 N. E. 833, 27 L. R. A. 710, 45 Am. St. Rep. 579.)

Appeal from the Common Pleas of New York City and County, General Term.

Action by the Health Department of the City of New York against the Rector, Churchwardens, and Vestrymen of Trinity Church, to recover a penalty for failure to supply the floors of a tenement house with Croton or other water. From a judgment of the General Term of the Court of Common Pleas of New York City and County (17 N. Y. Supp. 510) reversing a judgment for plaintiff, the latter appeals. Reversed.

The cause of action is founded upon section 663 of the consolidation act (Laws 1882, c. 410), relating to the city of New York, as such section was amended by chapter 84 of the Laws of 1887. After making various provisions in prior sections for the proper construction and ventilation of tenement houses in the city of New York, the Legislature, by the amendment of 1887, enacted as follows: "Sec. 663. Every such house erected after May 14th, 1867, or converted, * * * shall have Croton or other water furnished in sufficient quantity at one or more places on each floor, occupied or intended to be occupied by one or more families; and all tenement houses shall be furnished with a like supply of water by the owners thereof whenever they shall be directed so to do by the board of health. But a failure in the general supply of water by the city authorities shall not be construed to be a failure on the part of the owner, provided that proper and suitable

with it, before he can be charged with its violation. State v. Butts, 3 S. D. 577, 54 N. W. 603, 19 L. R. A. 725 (1893).

See S. W. Peabody, Historical Study of Legislation Regarding Public Health in New York and Massachusetts (Chicago, 1909) pp. 94–97:

"Notice and hearing does not appear in New York laws as essential to the enforcement of orders of a board of health in regard to nuisances until 1850. In that year the law for New York City (Laws N. Y. 1850, c. 275, tit. 3, art. 1, §§ 1, 3) required the city inspector, upon complaint being made of any trade as a nuisance and detrimental to health, to give notice to the persons concerned to show cause before the board of health why such trade should not be discontinued. The order of the board of health, given after a hearing, was final and conclusive, and disobedience to such orders was made a misdemeanor. When the law was brought before the courts for interpretation, they held that a resolution of the board of health directing a nuisance to be abated was void without such previous notice and hearing. People v. Bd. H. N. Y. City, 33 Barb. (N. Y.) 344 (1861). In cases arising under the law of the same year (1850) applying to the state at large, which made no mention of notice and hearing, it was held (Reed v. People, 1 Parker, Cr. R. [N. Y.] 481 [1854]; Rogers v. Barker, 31 Barb. [N. Y.] 447 [1860]) that the power to make regulations for the removal of nuisances did not include the power to make orders, on the ground that 'it is impossible to think the Legislature intended to confer on boards of health power to make an adjudication against an individual without notice and in his absence * * *' in-

appliances to receive and distribute such water are placed in said house. Provided, that the board of health shall see to it that all tenement houses are so supplied before January first, eighteen hundred and eighty-nine." The rest of the section is not material.

It appeared upon the trial that the defendant was the owner of certain houses in the city of New York, known as "Numbers 59, 77, 84, and 86 Charlton Street," and on the 20th of March, 1891, the plaintiff caused to be served on the agent of the defendant a notice requiring the defendant, in conformity with the provisions of the Sanitary Code, to alter, repair, cleanse, and improve the premises above mentioned, and directing that suitable "appliances to receive and distribute a sup-

volving penalties, and that 'the Legislature never designed to commit power to a board of health to conclude a thing was a nuisance and order its destruction without opportunity to be heard.' Nor were the powers of city councils acting under city charters interpreted more broadly. Under the charter of Syracuse (Charter of Syracuse, Laws N. Y. 1847, c. 475; Clark v. Syracuse, 13 Barb. [N. Y.] 32 [1852]) it was held that the city council had no right, 'without trial or notice to the party interested, to destroy large and valuable property, under pretense that it is a nuisance endangering the health of the city,' and that an injunction to restrain the board would be given. None of these cases reached the Court of Appeals, but the lower courts were quite consistently of the same opinion—that notice and hearing were necessary to the enforcement of orders.

'The laws of 1866 and 1867 establishing the metropolitan board of health brought the whole subject of quasi judicial powers prominently before the courts.† Section 14 of the law of 1866 (Laws 1866, c. 74) especially was attacked as being unconstitutional. In the course of the decisions rendered the courts declared that the quasi judicial functions conferred upon the board to issue warrants, give notice and hearing, and compel witnesses (Laws N. Y. 1867, c. 956) did not constitute a court, and that redress from its actions could always be had in the regular tribunals. Cooper v. Schultz, 32 How. Prac. (N. Y.) 107; Coe v. Schultz, 47 Barb. (N. Y.) 64; Reynolds v. Schultz, 34 How. Prac. (N. Y.) 147; Met. Bd. v. Heister, 37 N. Y. 661. See, also, Golden v. H. Dept., 21 App. Div. 420, 47 N. Y. Supp. 623. In the only case among those brought against the metropolitan board in which the question of hearing was definitely brought up (Reynolds v. Schultz), it was

† Laws N. Y. 1866, c. 74; Laws 1866, c. 686; Laws 1867, c. 700; Laws 1867, c. 956. In the cases brought against the metropolitan board of health the attack was made on three grounds: (1) That the law delegated legislative power to an appointed board; (2) that it delegated judicial authority; (3) that the summary powers granted to abate nuisances were contrary to the constitutional requirements of "due process" and trial by jury. In upholding the constitutionality of the law the courts held with regard to these objections: (1) That the Legislature could create new sanitary districts with appointive officers (Met. Bd. v. Heister, 37 N. Y. 661 [1868]). (2) That the power to make regulations was not true legislation, such regulations being in the nature of administrative by-laws (Cooper v. Schultz, 32 How. Prac. [N. Y.] 107 [1866]; Coe v. Schultz, 47 Barb. [N. Y.] 64 [1866]); but for the board to declare a thing a nuisance which was not such at common law was legislative and ultra vires (Mayor v. Bd. of H., 31 How. Prac. [N. Y.] 385 [1866]; Schuster v. Met. Bd., 49 Barb. [N. Y.] 450 [1867]). It is to be noted in this connection that, while the regulations of boards of health are not strictly legislation, they may become such by adoption, and the law may be built up in great part by such regulations. (3) That, while it was within the province of the Legislature to establish new courts and fix their jurisdiction, the quasi judicial powers conferred on the board did not constitute it a court (Met. Bd. v. Heister; Cooper v. Schultz). (4) That abatement by the board was not a taking of property without due process (Cooper v. Schultz; Weil v. Schultz, 33 How. Prac. [N. Y.] 7; Coe v. Schultz), and was less objectionable than abatement by private persons (Coe v. Schultz). (5) That a jury was not customary or necessary for determining the fact of a nuisance (Reynolds v. Schultz; Met. Bd. v. Heister).

ply of water for domestic use be provided on the top floor of No. 59; the basement, first and second floors of No. 77; the basement, first, second, and third floors of No. 84; and the basement and attic of 86." And the defendant was required to comply with the requirements within five days from the receipt of the notice, and it was also stated in the notice that any application for a necessary extension of time, or for the suspension of any part of the requirements contained in the written notice, should be made to the health department, at the time and place designated in the notice.

This action was brought against defendant as owner of houses Nos. 77 and 84 Charlton street. The defendant claims that the houses in

held that upon refusal to fix a day for a hearing of the party affected a mandamus would lie, and that it was a matter of grave doubt whether the Legislature could 'constitutionally authorize any person or body * * * to destroy property * * * without providing for a hearing before condemnation, or compensation.'

"Such notice and hearing were not explicitly required in the later general laws for local boards, although the power to make orders for the abatement of nuisances was given, as well as other judicial powers, i. e., to issue warrants and subpœnas, compel witnesses, administer oaths, with the same powers as justices of the peace in civil actions, and prescribe and impose penalties for violations of or failure to comply with orders or regulations (Laws N. Y. 1893, c. 661, § 21); but for many years the courts held that such notice was essential and was implied in the statute (People v. Bd. H. Seneca Falls, 58 Hun, 595, 12 N. Y. Supp. 561 [1891]; People v. Wood, 62 Hun, 131, 16 N. Y. Supp. 664 [1891]). 'The statute does not in words require notice, but this is clearly implied. * * * The accused must be enabled to defend himself before final judgment.'

"But although the necessity for notice and hearing had been the steady doctrine of the lower courts, when the matter came before the Court of Appeals after the cholera scare of 1892,‡ the opposite view was taken—that notice and hearing by the board of health were neither implied or essential; that there could be no final determination as to the fact of the nuisance, except by a regular court, nor without the appearance of the parties in such a court. 'A hearing was not necessary because the question of nuisance or not lies at the foundation of the jurisdiction, and the party proceeded against may always try that vital and decisive question in the courts, and is not foreclosed by the order made.' The same doctrine was laid down again in the famous case of N. Y. H. Dept. v. Trinity Church, and more emphatically in the later case of Cartwright v. Cohoes N. Y. Dept. v. Trinity Church, 145 N. Y. 32, 39 N. E. 833, 27 L. R. A. 710 (1895); Cartwright v. Cohoes, 165 N. Y. 631, 59 N. E. 1120 (1901). 'The board was not obliged to hear anybody. It could have acted upon its own inspection and knowledge of the premises.' But hand in hand with the advancement of the doctrine that notice and hearing by a board of health were not necessary nor implied in the law went the other doctrine that the question of the fact of the existence of the nuisance was always subject to investigation in court and that boards of health or health officers acted at their peril in abating a nuisance without the sanction of a court decision. Where, however, even at the present time, local charters require notice and hearing by the board before the abatement of nuisances, lack of such notice will be held to invalidate the action of the board. Eckhardt v. Buffalo, 19 App. Div. 1, 46 N. Y. Supp. 204 (1897); also Cushing v. Bd. H. Buffalo, 13 N. Y. St. Rep. 783 (1887)."

‡ People v. Bd. H. Yonkers, 140 N. Y. 1, 35 N. E. 320, 23 L. R. A. 481, 37 Am. St. Rep. 522 (1893): "When pestilence is forcing a way into our harbors, and danger and death approach through all rot and filth, it is the condition with which boards of health must grapple, and the condition which must be abated and removed without regard to the question who caused the trouble." Bd. H. v. Copcutt, 140 N. Y. 12, 35 N. E. 443, 23 L. R. A. 485 (1893).

question were not "tenement" houses, as that word is popularly used; that they were houses constructed many years ago as dwelling houses, and they have never been altered, with reference to their internal arrangement, so as to convert them into what would popularly be called "tenement houses." They were old-fashioned dwelling houses—two story, attic, and basement. There were hydrants in the backyards, accessible to all tenants of the houses. But the proof in the case shows at No. 77 Charlton street there were three families, and in No. 84 there were six families; and the houses came clearly and distinctly under the definition of "tenement houses," as enacted by section 666 of the consolidation act, as amended by the Laws of 1887 (chapter 84, p. 100.)

It is claimed on the part of the defendant that the buildings are in a transition neighborhood, which will be shortly required for business structures; that they are not in a neighborhood where all or many of the large buildings, which are known as "tenement houses," in the popular meaning of the word, are situated; and that these houses are not really within the reason of the statute. The defendant offered on the trial to give testimony as to the necessary cost of complying with the order of the board of health, which was excluded, and the defendant excepted. Defendant also offered to prove that the introduction of appliances to furnish water on each floor, and the required sinks and waste pipes to connect with the sewer, would cause great danger of injury to the property, through the water in the pipes freezing and the pipes bursting in the winter season; also, that no complaints had been made to the defendant corporation by the occupants of these houses, in reference to the want of water. All this evidence was excluded, under the objection of the plaintiff, and upon the exception of the defendant.

The general term of the common pleas granted leave to plaintiff to appeal from its order of reversal and granting a new trial, on the ground that a question of law was involved, which ought to be reviewed by this court.

PECKHAM, J. (after stating the facts).[25] * * * Assuming that this act is a proper exercise of the power, in its general features, we do not think that it can be regarded as invalid because of the fact that it will cost money to comply with the order of the board, for which the owner is to receive no compensation, or because the board is entitled to make the order, under the provisions of the act, without notice to and a hearing of the defendant. As to the latter objection, it may be said that, in enacting what shall be done by the citizen for the purpose of promoting the public health and safety, it is not usually necessary to the validity of legislation upon that subject that he shall be heard before he is bound to comply with the direction of the Legislature. People v. Board of Health, 140 N. Y. 1, 6, 35 N. E. 320, 23 L. R. A. 481, 37 Am. St. Rep. 522. The Legislature has power, and

[25] Only a portion of this case is printed.

has exercised it in countless instances, to enact general laws upon the subject of the public health or safety without providing that the parties who are to be affected by those laws shall first be heard before they shall take effect in any particular case.

So far as this objection of want of notice is concerned, the case is not materially altered in principle from what it would have been if the Legislature had enacted a general law that all owners of tenement houses should, within a certain period named in the act, furnish the water as directed. Indeed, this act does contain such a provision, but the plaintiff has not proceeded under it. If, in such case, the enforcement of the direct command of the Legislature were not to be preceded by any hearing on the part of any owner of a tenement house, no provision of the state or federal Constitution would be violated. The fact that the Legislature has chosen to delegate a certain portion of its power to the board of health, and to enact that the owners of certain tenement houses should be compelled to furnish this water after the board of health had so directed, would not alter the principle, nor would it be necessary to provide that the board should give notice and afford a hearing to the owner before it made such order. I have never understood that it was necessary that any notice should be given under such circumstances before a provision of this nature could be carried out. * * *

The citizen cannot, under this act, be punished in any way, nor can any penalty be recovered from him for an alleged noncompliance with any of its provisions, or with any order of the board of health, without a trial. The punishment or penalties provided for in section 665 cannot be enforced without a trial under due process of law, and upon such trial he has an opportunity to show whatever facts would constitute a defense to the charge; to show, in other words, that he did not violate the statute, or the order of the board, *or that the statute itself or the order was unreasonable and illegal.*[26] He might show that the house in question was not a tenement house, within the provision of the act, or that there was a supply of water as provided for by the act, or any other fact which would show that he had not been guilty of an offense with regard to the act. City of Salem v. Eastern R. Co., 98 Mass. 431, 447, 96 Am. Dec. 650. The mere fact, however, that the law cannot be enforced without causing expense to the citizen who comes within its provisions, furnishes no constitutional obstacle to such enforcement, even without previous notice to and a hearing of the citizen. What is the propriety of a hearing, and what would be its purpose? His property is not taken without due process of law, within any constitutional sense, when the enforced compliance with certain provisions of the statute may result in some reasonable ex-

[26] The words italicized are not found in the report of the case in the Northeastern Reporter.

pense to himself. Any defense which he may have is available upon any attempt to punish him, or to enforce the provisions of the law. * * *[27]

CITY OF SALEM v. EASTERN R. Co.

(Supreme Judicial Court of Massachusetts, 1868. 98 Mass. 431, 96 Am. Dec. 650.)

Contract, to recover $2,363.86, with interest from the date of demand, expended by the plaintiff in digging a canal for the purpose of abating a nuisance in the millpond in Salem.

WELLS, J.[28] * * * 3. The proceedings of the board of health are said to be defective, because taken without previous notice to the defendants and opportunity to be heard. The evidence tended to show that the defendants were notified of the pendency of proceedings, and of the action taken by the board of health from time to time; but there was no such notice beforehand as would give the defendants an opportunity to appear and be heard upon the contemplated action of the board, and there was no hearing upon any of the questions before them.

The statute does not require any previous notice. Notice must be given of general regulations prescribed by the board of health under sections 5 and 6 [Gen. St. 1860, c. 26], before parties can be held in fault for a disregard of their requirements. But, although such general regulations may seriously interfere with the enjoyment of private property, and disturb the exercise of valuable private rights, no previous notice to parties so to be affected by them is necessary to their validity. They belong to that class of police regulations to which all individual rights of property are held subject, whether established directly by enactments of the legislative power, or by its authority through boards of local administration. Baker v. Boston, 12 Pick. 184, 193, 22 Am. Dec. 421; Commonwealth v. Tewksbury, 11 Metc. 55; Commonwealth v. Alger, 7 Cush. 53, 85; Belcher v. Farrar, 8 Allen, 325. The authority of the board of health in respect to particular nuisances stands upon similar ground. Their action is intended to be prompt and summary. They are clothed with extraordinary powers for the protection of the community from noxious influences affecting life and health, and it is important that their proceedings should be em-

[27] See Chicago, etc., R. Co. v. Nebraska, 170 U. S. 57, 77, 18 Sup. Ct. 513, 521, 42 L. Ed. 948 (1898): "While no notice may have been given to the railroad companies of the pendency of the ordinance, and while they may not have been invited to participate in the proposed legislation, yet they had an opportunity to, and did in fact, put in issue, by the answer, both the validity of the ordinance and the reasonableness of the amount apportioned to them, respectively, for the repair of the viaduct in question."

[28] Only a portion of the opinion is printed.

barrassed and delayed as little as possible by the necessary observances of formalities.

Although notice and opportunity to be heard upon matters affecting private interests ought always to be given when practicable, yet the nature and object of these proceedings are such that it is deemed to be most for the general good that such notice should not be essential to the right of the board of health to act for the public safety. Delay for the purpose of giving notice, involving the necessity either of public notice or of inquiry to ascertain who are the parties whose interests will be affected, and further delay for such hearings as the parties may think necessary for the protection of their interests, might defeat all beneficial results from an attempt to exercise the powers conferred upon boards of health. There are many cases in which powers of determination and action, of a quasi judicial character, are given to officers intrusted with duties of local or municipal administration, by which not only the property but the lives of individuals may be affected, and which, from their nature, must be exercised, finally and conclusively, without a hearing, or even notice to the parties who may be affected. Of this class are the authority of fire wards or other officers to direct buildings to be demolished to prevent the spreading of fires (Gen. St. c. 24, § 4; Taylor v. Plymouth, 8 Metc. 462); of magistrates to require aid and to use force, armed or otherwise, to suppress tumults (Gen. St. c. 164, §§ 4, 6); of the mayor or other officers to call out a military force for like purposes (Gen. St. c. 13, § 134; Ela v. Smith, 5 Gray, 121, 66 Am. Dec. 356).

The necessity of the case, and the importance of the public interests at stake, justify the omission of notice to the individual. When the statute authorizing the proceedings requires no notice, their validity without notice is not to be determined by the apparent propriety of giving notice in the particular case, but by considerations affecting the whole range of cases to which the statute was intended to apply. * * *

6. The most important and most difficult question in the case relates to the effect of the orders of the board of health by which the existence of the nuisance was "found and determined," and that it was created and maintained by the defendants, and which also directed its removal by the defendants.

The plaintiffs' counsel contend that the proceedings of the board of health are quasi judicial, and that the determinations and orders made by them in that capacity are adjudications conclusive against the defendants upon all the facts involved in those determinations. If this be so, the defendants are precluded from denying the existence and alleged cause of the nuisance, and their duty to remove it. We do not find in the proceedings of the board of health, as reported, any determination by the board relative to the method of removal which was undertaken, other than by the subsequent adoption of a report stating the cost thereof, and that the trench was in successful operation. The

record indicates another mode quite different from the one actually adopted. The propriety of that mode of removal, the reasonableness of the expenses, and the success or failure of the attempted remedy, would therefore be open to investigation upon either view of the case.

But the court are of opinion that, in a suit to recover expenses incurred in removing a nuisance, when prosecuted against a party on the ground that he caused the same, but who was not heard, and had no opportunity to be heard, upon the questions before the board of health, such party is not concluded by the findings or adjudications of that board, and may contest all the facts upon which his liability is sought to be established. He is neither party nor privy to those adjudications; he has no right of appeal, and no other means by which to revise the proceedings or to correct errors, either of law or fact, therein. Parties similarly situated in respect to judgments in courts of law may impeach them collaterally. Vose v. Morton, 4 Cush. 27, 50 Am. Dec. 750. "It is an essential principle of natural justice that every man have an opportunity to be heard in a court of law, upon every question involving his rights or interests, before he is affected by any judicial decision of the question." Commonwealth v. Cambridge, 4 Mass. 627; Bradstreet v. Neptune Insurance Co., 3 Sumn. 600, 607, Fed. Cas. No. 1,793. In the case of Belcher v. Farrar, 8 Allen, 325, 328, it is intimated that even a general regulation, adopted by a board of health in accordance with the statute, which might operate to render valueless a large property by forbidding the prosecution of the business for which it was erected, would be invalid as in violation of "one of the fundamental principles of justice," but for a provision of the statute which gave to the party a right of appeal from the order enforcing the regulation, and upon such appeal to have the whole matter involved in the issue tried by a jury. * * *

Adjudications which stand merely as proceedings in rem cannot, as a general rule, be made the foundation of ulterior proceedings in personam, so as to conclude a party upon the facts involved. In most cases of suits which are in their nature proceedings in rem, and so designated, personal or public notice to parties interested is required to be given; and they are entitled to appear and be heard, and to have such rights in relation to the proceedings as are accorded to parties litigant. Against such parties, whether they have actually appeared or not, the adjudication is held to be conclusive upon the facts which are made the ground of the judgment, when those facts are again brought in question in ulterior or collateral proceedings. But such effect is due to the fact that they were so made parties to the proceedings. The Mary, 9 Cranch, 126, 144, 3 L. Ed. 678; Whitney v. Walsh, 1 Cush. 29, 48 Am. Dec. 590; Scott v. Shearman, 2 W. Bl. 977; Hollingsworth v. Barbour, 4 Pet. 466, 474, 7 L. Ed. 922.

When there appears to have been no notice to the parties to be affected, and no opportunity afforded them to be heard in defense of their rights, whatever operation the adjudication may have upon the

res, and however conclusive it may be held for the protection of those who act,[29] or derive rights under it, the adjudication itself can have no valid operation against parties who may be named in the proceedings. If it proceed to declare any obligation or impose any liability upon such parties, they may, in any subsequent suit to enforce it, deny the validity of the judgment, and controvert the facts upon which it was based. Boswell's Lessee v. Otis, 9 How. 336, 13 L. Ed. 164; Harris v. Hardeman, 14 How. 334, 14 L. Ed. 444; McKee v. McKee, 14 Pa. 231.

We think that these principles apply to the proceedings of a board of health. Their determination of questions of discretion and judgment in the discharge of their duties is undoubtedly in the nature of a judicial decision; and within the scope of the power conferred, and for the purposes for which the determination is required to be made, it is conclusive. It is not to be impeached or set aside for error or mistake of judgment, nor to be reviewed in the light of new or additional facts. The officer or board to whom such determination is confided, and all those employed to carry it into effect, or who may have occasion to act upon it, are protected by it, and may safely rely upon its validity for their defense. It is in this sense that such adjudications are often said to be conclusive against all the world; and they are so, so far as the res is concerned. The statute and the public exigency are sufficient to justify the omission of previous notice, hearing and appeal. But this exigency is met and satisfied by the removal of the nuisance. As a matter of police regulation, the proceedings and the authority of the board end here. When the city comes to seek its remedy over, to throw upon some individual, supposed to have caused the nuisance, the expenses of removal which it has incurred in the first instance as the representative of the public, there seems to be no reason, founded either in the public exigency or in the justice of the case, that requires or warrants the holding of such ex parte adjudications as final and conclusive to establish the facts upon which the claim rests. * * *

From the foregoing considerations we are led to construe the statutes in question as conferring no judicial power upon the board of health beyond that which is absolutely essential to the performance of their administrative functions for the accomplishment of the end contemplated, to wit, the summary abatement of nuisances of the class

[29] "It is true that it is said in Salem v. Railroad Co. [98 Mass. 431, 96 Am. Dec. 650] that the board's determination of questions of discretion and judgment in the discharge of their duties would protect all those employed to carry such determinations into effect. The remark is obiter, and it is doubtful perhaps on reading the whole case whether it means that the determination would protect them in an action for damages when the statute provided no compensation for property taken which is not a nuisance. To give it such an effect as a judgment merely would be inconsistent with the point decided, and with Brigham v. Fayerweather, 140 Mass. 411, 5 N. E. 265 (1886)." Miller v. Horton, 152 Mass. 540, 26 N. E. 100, 10 L. R. A. 116, 23 Am. St. Rep. 850 (1891).

indicated. The absence of any provision for previous notice and hearing, the summary execution of the order without means of redress or relief by appeal or otherwise against error and injustice, would make the proceedings violate the fundamental principles of justice universally recognized, if they should be held to establish, by an unalterable and absolutely conclusive decree, the personal liability of the parties who might be named by the board of health as having caused or permitted the nuisance. We cannot yield to a construction which would lead to such results. By the narrower construction which we have indicated, the statute will have its full and effective operation as a police regulation, while parties who are charged with responsibility for the expenses incurred will not be deprived of that full opportunity of defense which is essential to the due administration of justice in whatever form of judicial proceeding it may be undertaken.[30]

COMMONWEALTH v. SISSON (two cases).

(Supreme Judicial Court of Massachusetts, 1905. 189 Mass. 247, 75 N. E. 619, 1 L. R. A. [N. S.] 752, 109 Am. St. Rep. 630.)

Exceptions from superior court, Berkshire county.

Complaints by the Commonwealth against Henry D. Sisson and against Frank Sisson, for violation of an order of the fish and game commissioners prohibiting the discharge of sawdust into the Konkapot river. The superior court ordered verdict for the Commonwealth in each case, and defendants bring exceptions. Overruled.

LORING, J. These are two complaints, one against each defendant, charging them severally with permitting sawdust to be discharged into the Konkapot river, on March 29, 1905, in violation of an order made by the fish and game commissioners, under Rev. Laws, c. 91, § 8, dated August 1, 1904. The order, after reciting the authority given by the act, and stating that the mill here in question owned by the defendants had been examined by the board, and that it had been determined by the board that the fish in the brook are of sufficient value to warrant the prohibition of the discharge of sawdust into it, and that the discharge of sawdust from the defendants' mill into said brook materially injures the fish therein, directs the defendants (1) to erect a blower or take other means approved by the commissioners to prevent the discharge of sawdust from said mill into said brook directly or indirectly, and (2) not to accumulate a pile of sawdust on the bank of the brook, so that it may be liable to fall into the stream or be swept

[30] See Miller v. Horton, 152 Mass. 540, 26 N. E. 100, 10 L. R. A. 116, 23 Am. St. Rep. 850 (1891), post, p. 535; North American Cold Storage Co. v. Chicago, 211 U. S. 306, 29 Sup. Ct. 101, 53 L. Ed. 195 (1908), post, p. 256. See, also, Carter v. Colby, 71 N. H. 230, 51 Atl. 904 (1902); Loesch v. Koehler, 144 Ind. 278, 41 N. E. 326, 43 N. E. 129, 35 L. R. A. 682 (1896); King v. Hayes, 80 Me. 206, 13 Atl. 882 (1888).

away by a rise of water. At the trial it was proved that this order was served on the defendants on or before July 1, 1904, and that the defendants continued to discharge sawdust into Konkapot river up to the time these complaints were instituted. It also appeared that there were edible fish in the river at the time the board passed the order in question.

The defendants offered to show, in substance, that the commissioners in making the order did not act on sworn evidence or personal knowledge as to the fish or the sawdust; that in the spring of 1905 the defendants asked for a hearing, which the commissioners denied; that the mill has been used as it is now used for more than 30 years under a claim of right, and that the right was admitted by the next mill owner below; and, finally, that a compliance with the order as to a blower would impair the efficiency of the mill about 25 per cent., that the sawdust could not be sold, and to cart it away would entirely destroy the value of the land for mill purposes. This evidence was excluded and an exception was taken.

The defendant then made the following six requests for rulings, to wit: "First. That the act of the commissioners on fisheries and game, by which they determine that the fish in any brook or stream are of sufficient value to warrant the prohibition or regulation of the discharge of sawdust from any particular sawmill materially injuring such fish, is a judicial act, which can be lawfully performed only after the hearing of evidence bearing upon the questions involved, viz., the value of the fish in such brook or stream and the effect of such sawdust as injuring such fish. Second. That the order in this case, having been passed by the commissioners without hearing any evidence, and without any knowledge by them of the value of the fish in the stream or the amount of water in the stream, or the amount of sawdust that is discharged by defendants' sawmill into the stream, is not a lawful order under the statute, and is not binding upon the defendants. Third. That the defendants and the predecessors in title, having been discharging sawdust from their sawmills for more than 20 years consecutively under a claim of right into the Konkapot river, have acquired by prescription a title to such right, and such right is their property, of which they cannot be deprived without compensation. Fourth. That section 8 of chapter 91 of the Revised Laws makes no provision for compensation to the owner of a sawmill who is forbidden by an order of the commissioners to discharge sawdust into a brook or stream, and said statute is therefore unconstitutional and void so far as these defendants are concerned. Fifth. That this order of the commissioners so interferes with the use of the property of the defendants as to amount to a taking of such property for public use, and the order is void, as no compensation to defendants for such taking is provided by the order, or by the statute under which the order is made. Sixth. That this order of the commissioners so interferes with the use of the property of the defendants as to seriously damage, impair, or injure

such property, and the order is void, as no provision is made, either in the order or the statute under which the order is created, for compensating the defendants for such damage, impairment, or injury to their property."

The defendants' grievance is that by an order of the board of fish and game commissioners they have been deprived, without compensation being made therefor, of the right to conduct the business of sawing wood as they and their predecessors in title have conducted it for 30 years last past, that from this decision there is no appeal, and that not only was the order made without a hearing, but, when a hearing was asked for by the defendants, it was denied. Their contention is, first, that under the act they had a right to be heard at the trial in the superior court on the questions of fact determined by the board; second, that they could not be deprived by the board of their prescriptive right to discharge sawdust into Konkapot river without being heard and by a finding not made on sworn evidence; and, third, that under any circumstances this right cannot be take without compensation being made therefor.

In support of their contention they argue that the board, in determining (1) that the fish in Konkapot river are of sufficient value to warrant the prohibition or regulation of the discharge of sawdust therein, and (2) that the discharge of sawdust from the defendants' mill materially injured such fish, was a judicial action; and, in connection with this argument, they rely on the distinction pointed out in Salem v. Eastern Railroad Co., 98 Mass. 431, 96 Am. Dec. 650, between the action of a local board of health in making general regulations respecting articles capable of conveying infection or creating sickness and the authority of such a board to examine into the existence of any specific case of nuisance, filth, or cause of sickness dangerous to the public health and to make an order for the removal of it. The former, being a rule for all, is legislative in character; the latter, being a determination as to a particular thing, resulting in an order to the owner of it to do a specified act, is judicial in character. For a later case, where it is pointed out that similar legislative and judicial powers are given to the state board of health in connection with the pollution of a body of water used as a supply of a city or town, see Nelson v. State Board of Health, 186 Mass. 330, 71 N. E. 693.

We agree with the defendants' counsel as to what the order here in question is not. We agree that it is not a general regulation.[31] What is determined by it is that the discharge of sawdust from the defendants' mill materially injures the fish in Konkapot river, and it orders the defendants to erect a blower, and forbids the defendants making a pile of sawdust in connection with the mill; and it resulted in an order served on these defendants to do these acts. This is not a general regulation. But we do not agree that, because it is not a gen-

[31] That general regulations do not require notice, see Belcher v. Farrar, 8 Allen (Mass.) 325 (1864); Taunton v. Taylor, 116 Mass. 254 (1874).

eral regulation, it is a judicial action. The question to be decided here does not depend upon a choice between the two classes dealt with in Salem v. Eastern Railroad, 98 Mass. 431, 96 Am. Dec. 650, and in Nelson v. State Board of Health, 186 Mass. 330, 71 N. E. 693, and for these reasons:

We are of opinion, in the first place, that it is within the power of the Legislature to protect and preserve edible fish in the rivers and brooks of the commonwealth, and for that purpose, if they think proper, to forbid any sawdust being discharged into any brook containing such fish. The right to run a sawmill on the bank of a brook or a river is, like all rights of property, subject to be regulated by the Legislature, when the unrestrained exercise of it conflicts with other rights, public or private. See Commonwealth v. Alger, 7 Cush. 53, 54; Rideout v. Knox, 148 Mass. 368, 19 N. E. 390, 2 L. R. A. 81, 12 Am. St. Rep. 560. The defendants' contention that they have a prescriptive right to discharge sawdust into the river, even if it kills or injures the fish therein, which prescriptive right cannot be taken away or impaired without compensation being made therefor, means this, and nothing more: Where the Legislature, up to the passage of the act here in question (St. 1890, p. 106, c. 129), had not regulated the business of sawing wood on the banks of streams having in them edible fish, and where, in the absence of such regulation, the defendants had discharged sawdust into the stream for 30 years, the people have lost the power to regulate the conflicting rights of sawmills on the bank of the stream and to preserve fish in the stream itself. The statement of the proposition is enough to show that there is nothing in it. The decision in Attorney General v. Revere Copper Co., 152 Mass. 444, 25 N. E. 605, 9 L. R. A. 510, relied on by the defendants, is confined to the gaining of prescriptive rights with respect to property owned by the public under a statute of limitations, which puts the property rights of the public on the same basis as those of individuals.

We are of opinion, in the second place, that in case the Legislature thought that in regulating the conflicting rights of individuals to run sawmills on the banks of a river on the one hand, and of the public, on the other hand, to have fish live and increase in the same stream, it was not worth while to forbid sawdust being discharged into every stream in which there were edible fish, they could leave to a board having peculiar knowledge on the subject the selection of the brooks and rivers in which the fish were of sufficient value to warrant the prohibition or regulation of the discharge of sawdust. The right of the Legislature to delegate some legislative functions to state boards was considered by this court in Brodbine v. Revere, 182 Mass. 598, 66 N. E. 607. And, further, in case the Legislature thought that an act which forbade any sawdust to be discharged into any of the streams selected by the board was an unnecessarily stringent one, they could, in our opinion, leave it to the board to settle in each particular case the practical details required to harmonize best these two conflicting rights.

The power thus delegated to the board of fitting the details of regulation to the particular circumstances of each case is of the same character as that long exercised by the fish and game commissioners and their predecessors, the board of inland fisheries, in prescribing the details of the construction of the fishways to be constructed in dams where by law fishways have to be maintained. See St. 1866, pp. 231, 232, c. 238, §§ 2, 6; St. 1867, p. 741, c. 344; Pub. St. 1882, c. 91, § 4. See, also, 3 Province Laws, 1745–46 (State Ed.) c. 20, p. 267. These acts provide that the board, after examination of dams upon rivers where the law requires fishways, is to determine whether the fishways in existence are sufficient, and to prescribe by an order in writing what changes or repairs, if any, shall be made, and at what times the fishways are to be kept open, and to give notice thereof to the owners of such dams. The action of the fish commissioners under these acts is unquestionably legislative in character, and we cannot doubt that their action under them, exercised and acquiesced in by the public for this length of time, is valid.

The result is that in our opinion the action of the board in the case at bar was the working out of details under a legislative act. The board is no more required to act on sworn evidence than is the Legislature itself, and no more than in case of the Legislature itself is it bound to act only after a hearing, or to give a hearing to the plaintiff when he asks for one; and its action is final, as is the action of the Legislature in enacting a statute, and, being legislative, it is plain that the questions of fact passed upon by the Legislature in adopting the provisions enacted by them cannot be tried over by the court. This court has been recently asked to try over the expediency of compulsory vaccination in an action under a statute requiring it. Com. v. Jacobson, 183 Mass. 242, 66 N. E. 719, 67 L. R. A. 935. On its declining to do so an appeal was taken to the Supreme Court of the United States, and its refusal to do so was held to be correct. Jacobson v. Mass., 197 U. S. 11, 25 Sup. Ct. 358, 49 L. Ed. 643. See particularly page 30 of 197 U. S., page 363 of 25 Sup. Ct. (49 L. Ed. 643). See, also, Devens, J., in Train v. Boston Disinfecting Co., 144 Mass. 531, 11 N. E. 929, 59 Am. Rep. 113.

The practical result is that the defendants are forbidden to conduct their sawmill as they had conducted it for 30 years by a board who have not heard evidence and have refused the defendants a hearing, that the action of the board is final, and that no compensation is due to them. This result may seem strange. But it is no less strange than the practical results in cases which are decided law. Take the case before the court in Nelson v. State Board of Health, 186 Mass. 330, 71 N. E. 693, namely, a farm on the banks of a pond used as the water supply of a town. The state board of health can pass a general regulation under section 113, c. 75, Rev. Laws, forbidding privies within a specified distance from its shore; and, if the defendant had a privy there for 30 years, his right to maintain it would cease, al-

though the order was made without hearing; and the action of the board is final. On the other hand, if the board had proceeded, under section 118, to investigate this particular privy, the defendant would have been entitled to a hearing, and, on appeal, to a jury, as provided by section 119.

Again, take, for example, the regulation of a local board of health in question in Train v. Boston Disinfecting Co., 144 Mass. 523, 11 N. E. 929, 59 Am. Rep. 113, requiring all rags arriving at the port of Boston from any foreign port to be disinfected at the expense of the owner before being discharged. The power of the local board of health to declare these rags a nuisance per se, so as to impose upon the owner without trial the expense of disinfecting them, was established by this court in that case. Had the local board undertaken to investigate the particular rags in question in Train v. Boston Disinfecting Co., under their jurisdiction to inquire into sources of filth, and they had been authorized under that act to abate the nuisance if they found the rags to be a nuisance, by ordering them to be disinfected at the expense of the defendant, they would have had to give the defendant a hearing on notice, and from their decision the defendant would have had a right to a trial by jury.

That is what was decided in Salem v. Eastern Railroad, 98 Mass. 431, 96 Am. Dec. 650. That is to say, on the one hand, where the law is general and the question is whether under it the defendants are committing a nuisance, the facts are determined by judicial action; on the other hand, the determination of the same facts is legislative in case the Legislature decides to make the thing a nuisance per se. And where it is legislative it is final, and no hearing is necessary; and where, as is the case here, it is made in the exercise of the police power, no compensation is due.

The delegation of such legislative powers to a board is going a great way. But the remedy is by application to the Legislature, if a remedy should be given. In our opinion it is within its constitutional power, and the court can give no remedy. For similar cases, where the use which can be made of property has been left to the final determination of boards, see Newton v. Joyce, 166 Mass. 83, 41 N. E. 116, 55 Am. St. Rep. 385; Com. v. Roberts, 155 Mass. 281, 29 N. E. 522, 16 L. R. A. 400. See, also, in this connection, In re Wares, Petitioners, 161 Mass. 70, 36 N. E. 586. The difference between the majority and the minority of the court in Miller v. Horton, 152 Mass. 540, 26 N. E. 100, 10 L. R. A. 116, 23 Am. St. Rep. 850, was on the construction of the act there in question.

Exceptions overruled.[32]

[32] "It is urged that there was denial of due process of law in failing to accord plaintiff in error a hearing before the board of tea inspectors and the Secretary of the Treasury in establishing the standard in question, and before the General Appraisers upon the re-examination of the tea. Waiving the point that the plaintiff in error does not appear to have asked for a hear-

SECTION 21.—IN REVOKING LICENSES

COMMONWEALTH v. KINSLEY.

(Supreme Judicial Court of Massachusetts, 1882. 133 Mass. 578.)

FIELD, J. The defendant was complained of for unlawfully keeping, in a building occupied by him in Millbury, a table for the purpose of playing at pool for hire, gain and reward, without authority or license therefor.

By Gen. St. c. 88, §§ 69–72, as amended by St. 1880, c. 94, the selectmen in towns are authorized to grant licenses for such a table, but "such license may be revoked at the pleasure of the authority granting it"; and all persons are prohibited, under a penalty, from keeping such a table without a license.

A license had been duly granted to the defendant, and it had been revoked by the selectmen without giving him notice of their intention to revoke it; but they had given the town clerk a certificate of the vote revoking the license, and he had informed the defendant of its contents, and thereafterwards the defendant "allowed a pool table to be used for hire upon his premises." The defendant contends that this revocation was inoperative, because it was made without giving him an opportunity to be heard, and that, if the statutes purport to authorize a revocation without notice, they are in this respect unconstitutional and void.

The keeping of a pool table for hire is one of many things affecting the public morals, which the Legislature can either absolutely prohibit or can regulate, and one common form of regulation is by requiring a license. A licensee takes his license subject to such conditions as the Legislature sees fit to impose, and one of the statutory conditions of this license was that it might be revoked by the selectmen at their pleasure. Such a license is not a contract, and a revocation of it does not deprive the defendant of any property, immunity or privilege within the meaning of these words in Declaration of Rights, art. 12. Commonwealth v. Blackington, 24 Pick. 352; Calder v. Kurby, 5 Gray, 597; Commonwealth v. Colton, 8 Gray, 488; Commonwealth v. Brennan, 103 Mass. 70; Commonwealth v. Adams, 109 Mass. 344; Commonwealth v. Fredericks, 119 Mass. 199.

ing, and assuming that the statute did not confer such a right, we are of opinion that the statute was not objectionable for that reason. The provisions in respect to the fixing of standards and the examination of samples by government experts was for the purpose of determining whether the conditions existed which conferred the right to import, and they therefore in no just sense concerned a taking of property. This latter question was intended by Congress to be finally settled, not by a judicial proceeding, but by the action of the agents of the government, upon whom power on the subject was conferred." Buttfield v. Stranahan, 192 U. S. 470, 497, 24 Sup. Ct. 349, 355 (48 L. Ed. 525) (1904).

It is immaterial in what manner the defendant obtained knowledge that his license had been revoked. Without considering whether the defendant would be liable to the forfeiture imposed by Gen. St. c. 88, § 70, if he had not had either notice or knowledge that his license had been revoked, after such knowledge he would clearly be liable. St. 1876, c. 147,[33] has no application to this case.

Exceptions overruled.

MARTIN v. STATE.

(Supreme Court of Nebraska, 1888. 23 Neb. 371, 36 N. W. 554.)

Error to district court, Lancaster county.

George Martin was indicted for selling liquors without a license. Case tried upon a stipulation of facts. Judgment for the State, and defendant brings error.

REESE, C. J. Plaintiff in error was convicted of the crime of selling intoxicating liquors in violation of law, not having a license therefor. * * *

It appears by the record that a license was issued to plaintiff in error on the 13th day of April, 1887, by which he was permitted to sell intoxicating liquors until the second Tuesday in April, 1888, but that on the 22d day of June, 1887, he was convicted of selling liquor on Sunday, the 12th day of the same month. This conviction was had in the police court, and on the 27th day of June the police judge certified the conviction to the city council. At a subsequent meeting of the council, we presume, although the date is not given, the resolution revoking the license was adopted without any notice having been given to plaintiff in error of the contemplated action of the council. The section of the statute under which this action was had is section 92 of the law governing cities of the first class (Comp. St. 1887, c. 13a), which is as follows:

"Sec. 92. The mayor and council may, by ordinance, license, restrain, regulate, or prohibit the selling or giving away of malt, spirituous, or vinous, mixed or fermented, intoxicating liquors, the license not to extend beyond the municipal year for which it shall be granted, and to determine the amount to be paid for such license not less than the minimum sum required by any general law upon the subject; * * * provided, that any permits issued to a druggist may be revoked by the council at pleasure; and further, that any license issued

[33] This statute provides that licenses granted to keepers of billiard saloons under Gen. St. c. 88, shall be signed by the clerk of the city or town in which they are granted, shall be recorded by him, and shall continue in force until the 1st day of May next ensuing, unless sooner revoked, and that, when revoked, the clerk of the city or town shall give written notice of such revocation to the holder of the license.

Accord: Child v. Bemus, 17 R. I. 230, 21 Atl. 539, 12 L. R. A. 57 (1891).

by the mayor and council for any purpose mentioned in this section shall be revoked by the mayor and council upon the conviction of the licensee of any violation of any law, ordinance, or regulation pertaining to the sale of such liquors, and proceedings of appeal or error taken to review such judgment or conviction shall in no wise affect the revocation of such license, or the effect of such conviction, until such appellate or error proceedings be finally determined, and such conviction be finally annulled, revoked, or reversed."

It is made the duty of the mayor and council to revoke the license "upon conviction of the licensee of any violation of any law, ordinance, or regulation pertaining to the sale of" liquors. The language of the statute is imperative. Any license "shall be revoked" upon such conviction. But it is contended that before the mayor and council can legally revoke the license, notice must be given to the licensee in order that he may show cause, if any exists, why the license should not be revoked. In support of this contention it is insisted that the license is a franchise, or public right, vested in the individual, and for which he has paid a consideration, and therefore it has all the necessary elements of property under the provision of the Constitution that "no person shall be deprived of life, liberty, or property without due process of law." There is no vested right in a license to sell intoxicating liquors, which the state may not take away at pleasure. Pleuler v. State, 11 Neb. 547, 10 N. W. 481. Such licenses are not contracts between the state or municipality issuing them and the licensee, but are mere temporary permits to do what otherwise would be unlawful. Barrie v. Schultz, 34 N. Y. 657. They are subject to the direction of the government, which may revoke them as it deems fit, and may be abrogated by the adoption of a municipal ordinance prohibiting the sale of liquors. Columbus City v. Cutcomp, 61 Iowa, 672, 17 N. W. 47.

The law of 1881, commonly known as the "Slocumb Law," absolutely prohibits the entire traffic in intoxicating liquors "by the most expressive language," giving only an exception where the license or permit is issued. Pleuler v. State, 11 Neb. 547, 10 N. W. 481. We therefore conclude that there is no such vested right or essential element of property in a license as to bring it within the provision of the Constitution above quoted.

But this does not entirely dispose of the question here presented; for, if notice to the licensee was necessary to give the municipal authorities jurisdiction, the acts of the council might still be void for want of authority or power to act. A number of cases are cited by plaintiff in error, holding that notice in the particular cases then under consideration was necessary. These cases are: Plummer v. Com., 1 Bush (Ky.) 26; State ex rel. Heise v. Town Council, 6 Rich. Law (S. C.) 404; Com. v. Moylan, 119 Mass. 109; and Gaertner v. City of Fond du Lac, 34 Wis. 504.

In Plummer v. Com. one Shepherd was licensed by the county court to keep a tavern. Before the expiration of the license, the county

court, without any notice, suspended the same until the next term of court. During this period Plummer assisted Shepherd in retailing liquors, and was indicted therefor. He justified under Shepherd's license. To avoid this, the prosecutor offered in evidence the order of suspension, which was admitted over the objection of the accused. For this the Court of Appeals reversed the judgment of conviction. The action of the county court was had under section 9, c. 99, 2 Stanton's Rev. St. Ky., which provided, in substance, that it should be the duty of every trustee of a town, when informed that an offense was committed by a tavern keeper of his town, "to make the same known to the judge of the county court, who shall cause the alleged offender to be summoned to appear before him at a time and place designated, to show cause why his license shall not be suspended until the next county court, when the judge should "hear and decide the case," and make such order as might be necessary. As the county judge had omitted to cause Shepherd "to be summoned to appear before him," as plainly required by statute, it was very properly held that the trial court erred in admitting the order of suspension in evidence.

The case of State ex rel. Heise v. Town Council was where the town council of Columbia had enacted an ordinance that upon a retailer of spirituous liquors selling liquor to a slave, his license should be forfeited; and it was held that under the charter no other penalties than fines should be inflicted, and therefore the ordinance was void, as well as the order of forfeiture under it.

The case of Com. v. Moylan was where the defendant was accused of selling liquors in violation of law. Proof of the sale was made. She relied on her license previously issued. The government then introduced the record of the mayor and aldermen, showing a revocation of the license, which was admitted over the objections of the defendant. The record showed that the committee, before whom the hearing was had, reported to the council that in their opinion it was inexpedient to take further action in the matter. The report was accepted. It was then ordered that the license be revoked. It was held by the Supreme Court that it was not within the power of the council to arbitrarily revoke the license, there being no proof of any violation of its conditions. The statute of that state provided that "the mayor and aldermen, or the selectmen of the city or town by which a license has been issued, after notice to the licensee and reasonable opportunity to be heard by them, or by a committee of their number, may declare the license forfeited, upon proof satisfactory to them that he has violated, or permitted to be violated, any of the conditions thereof." Yet, in the later case, Com. v. Hamer, 128 Mass. 76, decided by the same court, it was held that a written notice to the licensee was not required, and that "if any notice is necessary," a verbal notice would be sufficient.[34]

[34] The question in this case was whether notice of the revocation was required to be given, after the license had been revoked.

In Gaertner v. City of Fond du Lac, the Supreme Court of Wisconsin, by a dictum, says: "It would seem that the council of the city has no authority to revoke a license upon judgments without giving the licensee notice and opportunity to be heard, but the point is not here decided." If that case is authority for anything, it would simply be that when charges are preferred against a licensee for violation of the law, it would probably be necessary that notice of the pendency of such charges should be given before the question could be examined and license revoked.

In this case, the statute makes no reference to the hearing of a complaint by the mayor and council, but simply provides that "the license shall be revoked by the mayor and council, upon conviction of the licensee of any violation of any law, ordinance, or regulation pertaining to the sale of such liquors," etc. No trial or investigation could be had. The certificate of the police judge, showing a conviction of plaintiff in error, was before the council. They had but a simple ministerial duty to perform, in obedience to the plain mandate of the law, and that was to revoke the license. It is stipulated that he was convicted of the offense stated in the certificate of the police judge. It is admitted that the certificate was true. That being the case, no defense could have been made, and no notice was necessary to give the council jurisdiction.[35] * * *

The judgment of the district court is therefore affirmed.[36]

REX v. VENABLES.

(Court of King's Bench, 1725. 2 Ld. Raym. 1405.)

An order was made by two justices of the peace for the county of Hertford, 15th November, 1723, reciting, that whereas it appeared upon oath, that the defendant kept a common alehouse in the borough of Hertford, and that he kept it as a disorderly house; whereupon the said justices, for the reason aforesaid, and by reason a greater number of alehouses was kept in the said borough than were necessary, by the said order discharged and put away the selling ale from the said house, and did suppress the said Robert Venables from keeping a common alehouse, &c. Afterwards the justices the 3d of June, 1724, made another order, reciting the former orders, and a warrant under their hands and seals commanding the constable to give notice of that order, and that oath had been made before them, that the defendant was served with that order, and reciting, that it appeared to them by the oath of two persons named in that order, that since the defendant had notice of that order, he had continually to the date thereof used

[35] The opinion on the other two points is omitted.

Accord: People v. Meyers, 95 N. Y. 223 (1884); Sprayberry v. Atlanta, 87 Ga. 120, 13 S. E. 197 (1891); Genova's License, 3 Pa. Dist. 722 (1889).

[36] The dissenting opinion of Maxwell, J., is omitted.

the said house as an alehouse, and used commonly the selling of ale and beer therein, contrary to the former orders; the said justices therefore, by virtue of the statute, &c. ordered that the defendant should be committed to gaol for three days, and until he should enter into a recognizance, not to sell ale, &c.

The defendant having removed these orders by certiorari into this court, Mr. Reeve took exception to both the orders, that it did not appear by either of them, that the defendant was summoned, and had an opportunity of making his defence; whereas if he had been heard, possibly he might have satisfied the justices, that the complaint was groundless. That in all summary convictions, of which nature these orders were, a summons was necessary to be shewn. So is 1 Salk. 181, Reg. v. Dier, where it is held by the court, that upon the complaint, the justices ought to make a memorandum and issue a summons, and if the party will not appear, or cannot be found, they may proceed; but there the conviction was quashed, because in the summons set out, the time of the appearance therein directed was impossible.[37] * * *

THE COURT were unanimously of opinion, that the party in these cases ought to be heard, and for that purpose ought to be summoned on fact; and if the justices proceeded against a person without summoning him, it would be a misdemeanor in them, for which an information would lie against them. But since in these sorts of orders, for suppressing alehouses, keeping bastards, &c., summonses have not been set out, they would intend the justices having jurisdiction had proceeded regularly, and that there was a summons; it not appearing by the order, that there was none, or that there had been an ill summons; for where it appears there was an ill summons, that will be fatal, and leave no room to make it good by intendment: which answers the case, 1 Salk. 181.

And FORTESCUE, Justice, said, the case of the Queen v. King was the very case in point. And the orders were confirmed, June 10, 1725. But afterwards it being made to appear to the court by affidavits, that the justices had proceeded in making the last order, without summoning Venables; after having heard counsel for the justices, the court gave leave to file an information against them.

PEOPLE, for Use of STATE BOARD OF HEALTH v. McCOY.

(Supreme Court of Illinois, 1888. 125 Ill. 289, 17 N. E. 786.)

SCOTT, J.[38] This suit was brought in the criminal court of Cook county, under and by virtue of the provisions of section 12 of the act of 1887 (Laws 1887, p. 228), to regulate the practice of medicine in

[37] A portion of this case is omitted.

[38] Only a part of the opinion of Scott, J., is printed.

this state, in the name of the people, for the use of the State Board of Health, against John C. McCoy, alias J. Cresap McCoy, to recover the statutory penalty imposed by that section for practicing medicine without a certificate from the State Board of Health. On the trial, the court found the issues for defendant and rendered judgment against plaintiff for costs. * * *

It is said the state board, in regard to revoking certificates issued to physicians, must investigate, hear and determine certain questions, and to the extent it exercises such powers its functions are judicial. It is therefore claimed that the question whether a physician has been guilty of "unprofessional or dishonorable conduct" is a question of fact, the finding as to which, when submitted to the board, is final and conclusive, and is not open to review by other tribunals. The doctrine contended for finds support in the decision of this court in People v. Dental Examiners, 110 Ill. 180. Treating the record of the board, in the matter of revoking the certificate that had been issued to defendant, as having the force of a proceeding in its nature judicial on the part of the board in a case where it had jurisdiction of the subject-matter to be investigated, yet the present record is fatally defective, for the reason it is made to appear defendant had no notice of the proceedings proposed to be taken against him. The prosecution put defendant on the stand, and made him their own witness, and he distinctly stated, at their instance, that the notice found in the record was never in fact served upon him. The affidavit of service is not sufficient to overcome his testimony in that respect. It is contrary to the analogies of the law that a proceeding, in its nature judicial, should be obligatory and conclusive upon a person not a party thereto; otherwise a party might be deprived of important rights, with no opportunity to defend against wrongful accusations. Whether the right to practice medicine or law is property, in the technical sense, it is a valuable franchise, and one of which a person ought not to be deprived, without being offered an opportunity, by timely notice, to defend it. * * *

The judgment will be affirmed.[39]

[39] Act 1887, § 9, did not expressly provide for notice to the person proceeded against before revoking the certificate to practice medicine. The present act (Laws 1899, p. 275, § 6) does.

See Century Digest, Process, §§ 201–203. See, also, Oshkosh v. State, 59 Wis. 425, 18 N. E. 324 (1884); State v. Schultz, 11 Mont. 429, 28 Pac. 643 (1892).

PEOPLE ex rel. LODES v. DEPARTMENT OF HEALTH OF CITY OF NEW YORK.

(Court of Appeals of New York, 1907. 189 N. Y. 187, 82 N. E. 187, 13 L. R. A. [N. S.] 894.)

Appeal from Supreme Court, Appellate Division, Second Department.

Mandamus by the People of New York, on the relation of George Lodes, against the Department of Health of the City of New York, to compel the board of health of the respondent to rescind its action revoking permits issued to the relator to sell milk in the borough of Brooklyn. From an order of the Appellate Division (116 App. Div. 890, 102 N. Y. Supp. 1145), affirming an order of the Special Term (51 Misc. Rep. 190, 100 N. Y. Supp. 788), granting a peremptory writ, respondent appeals. Reversed, unless the relator within 20 days elects to demand an alternative writ, in which case proceedings should be remitted to the Special Term.

HAIGHT, J. On the 17th day of April, 1903, the board of health of the department of health of the city of New York issued to the relator, George Lodes, six permits to sell and deliver milk from wagons and from his store in the borough of Brooklyn, which permits were revoked by the board of health, without notice to him, on the 17th day of January, 1906. Thereupon the relator applied for a peremptory writ of mandamus to compel the board of health to rescind its action in revoking the permits, alleging that there was no public necessity for the revocation of the permits; that the action of the board was arbitrary and unreasonable, tyrannical and oppressive in the extreme, and beyond the power and authority conferred upon it by law. On the hearing of such application, the board of health presented affidavits showing that the relator, his wife, and the drivers of his wagons had been four times convicted of selling, or offering for sale, adulterated milk, and that their action in revoking his permits was based upon such repeated violations of the law, and that by reason thereof they deemed him an unfit person to traffic in milk. The Special Term granted the peremptory writ prayed for, and the affirmance of that order by the Appellate Division is now brought up for review.

The Sanitary Code of the city of New York, which was continued in force by the charter of the city (section 1172, c. 466, p. 499, Laws 1901), provides: "Section 56. No milk shall be received, held, kept, offered for sale or delivered in the city of New York without a permit, in writing, from the board of health and subject to the conditions thereof." The provisions of the Sanitary Code, alluded to, have been held to be reasonable and a valid exercise of the police powers, and violative of no provision of the Constitution, either state or federal. People ex rel. Lieberman v. Vandecarr, 175 N. Y. 440, 67 N. E. 913, 108 Am. St. Rep. 781, affirmed 199 U. S. 552, 26 Sup. Ct. 144, 50 L.

Ed. 305. It has also been held that the board of health has power to revoke permits to sell milk, notwithstanding no ordinance had been adopted by the board authorizing such revocation. Metropolitan Milk & Cream Co. v. City of New York, 113 App. Div. 377, 98 N. Y. Supp. 894, affirmed in this court 186 N. Y. 533, 78 N. E. 1107. These questions we regard as settled.

The only question remaining to be disposed of is as to whether the relator was entitled to notice and a hearing by the board of health before revoking his permits. The answer to this question may depend upon the soundness of the relator's contention that the permits issued to him were property, of which, under the Constitution, he cannot be deprived without due process of law. He maintains that he has established and built up a business of selling milk at his store and has a regular line of customers whom he supplies daily; that he has established a milk route over which his wagons are sent daily distributing milk to the inhabitants of the city in that locality; and that this established business has become property, of which he cannot be deprived. But the good will of his business, so established, must not be confounded with the permits granted to him to engage in that business. He was never licensed to sell impure and adulterated milk, and after he had obtained his permits to sell and undertook the securing of customers, he knew that he was engaging in a business which must be conducted under the supervision of the board of health of the city subject to the police powers of the state, and that such permits were subject to revocation. He knew that the permits contained no contract between the state, or the board of health, and himself, giving him any vested right to continue the business, and that it would become the duty of the board to revoke his license, in case he violated the statute, or the conditions under which it was granted.

Milk is an article of food extensively used by our inhabitants and is chiefly relied upon to support the lives of infant children. If impure or adulterated, or polluted with germs of dangerous or infectious diseases, its use becomes highly dangerous, and the health and welfare of the public demand speedy and, in some cases, instant prevention of its distribution to the people. While it is the duty of the board of health to watch and, through its inspectors, detect violations of the statute and the conditions imposed by it, it has been given no judicial power to hear, try, and determine such violations, but must act upon the information obtained by it through its own channels of inquiry. In Cooley's Constitutional Limitations (7th Ed.) p. 887, it is said that: "Dealers may also be compelled to take out a license, and the license may be refused to a person of bad reputation, or be taken away from a party detected in dishonest practices." [The court then cites, and quotes from, Crowley v. Christensen, 137 U. S. 86, 11 Sup. Ct. 13, 34 L. Ed. 620, Dent v. West Virginia, 129 U. S. 114, 9 Sup. Ct. 231, 32 L. Ed. 623, Metropolitan Board of Excise v. Barrie, 34 N. Y. 657, and Matter of Lyman, 160 N. Y. 96, 54 N. E. 577.]

We incline to the view that the authorities to which reference has been made are conclusive upon the subject; and, although the relator had established a business and secured customers under the permits granted to him, the permit itself cannot be treated as property in any legal or constitutional sense, but was a mere license revocable by the power that was authorized to issue it. The statute, as we have seen, has given the board of health no power to hear, try, or determine cases. Its duties are therefore not judicial, but executive or administrative, and at times must be exercised summarily, as was said in Metropolitan Board of Health v. Heister, 37 N. Y. 661: "The power to be exercised by this board upon the subjects in question is not judicial in its character. It falls more properly under the head of an administrative duty." The court in that case had under consideration the question of the abating of a nuisance, or the recovery of a penalty therefor, occasioned by the alleged maintenance of a slaughterhouse in a densely populated portion of the city in such a manner as to endanger the health of the inhabitants. But we see no reason why the power of the board of health in that case should differ from the powers of the board in this case. Each have reference to the preservation of the public health, and, if their powers are administrative in that case, they must be in this case. [The court then cites and quotes from People ex rel. Copcutt v. Board of Health, 140 N. Y. 1, 35 N. E. 320, 23 L. R. A. 481, 37 Am. St. Rep. 522, ante, p. 139.] See, also, People ex rel. Schau v. McWilliams, 185 N. Y. 92, 77 N. E. 785, in which Chief Judge Cullen has recently reviewed the authorities upon the subject, pointing out the difference between judicial powers and the action of administrative or executive officers.

The powers of the members of the board of health being administrative merely, they can issue or revoke permits to sell milk in the exercise of their best judgment, upon or without notice, based upon such information as they may obtain through their own agencies, and their action is not subject to review either by appeal or by certiorari. Child v. Bemus, 17 R. I. 230, 21 Atl. 539, 12 L. R. A. 57; State ex rel. Cont. Ins. Co. v. Secretary of State, 40 Wis. 220; Wallace v. Mayor, etc., of Reno, 27 Nev. 71, 73 Pac. 528, 63 L. R. A. 337, 103 Am. St. Rep. 747. If, however, their action is arbitrary, tyrannical, and unreasonable, or is based upon false information, the relator may have a remedy through mandamus to right the wrong which he has suffered. If the relator can show that he and those acting for him have not been convicted of violating the statute and the conditions imposed in the granting of the permits, and that consequently he is a fit and proper person to engage in the sale and distribution of milk among the inhabitants of the city, then he would be entitled to the relief asked for. But if he desired to submit such evidence, he should have asked for an alternative rather than a peremptory writ. If, however, the charge of the board is true that he has been convicted of the offenses charged the number of times stated, the conclusion is irresistible that he was an

improper person to be intrusted with the permit of the city to dispense to the inhabitants of the city a food product that was liable, if adulterated, to endanger the health of the people.

It is now contended, however, that the members of the board of health are judicial officers and act as such by virtue of the provisions of section 1173 of the Greater New York charter. 3 Laws 1901, p. 500, c. 466. It will be necessary to consider the whole section, for we think the subsequent provisions indicate the intention and purpose of the former. It is as follows: "The actions, proceedings, authority, and orders of said board of health shall at all times be regarded as in their nature judicial, and be treated as prima facie just and legal. All meetings of said board shall in every suit and proceeding be taken to have been duly called and regularly held, and all orders and proceedings to have been duly authorized, unless the contrary be proved. All courts shall take judicial notice of the seal of said board and of the signature of its secretary and chief clerk." Were these provisions intended to change the character of the board of health from administrative to judicial officers? We think not. They do not state that the board shall act judicially, or that its orders shall be regarded and treated as the orders of a judge or court, but merely that they shall be regarded in their nature judicial, and that they shall be treated as prima facie just and legal, and that all orders and proceedings have been duly authorized. To our minds it is quite apparent that the legislative purpose and intent was to invest the orders and proceedings of the board of health with the presumption that they were duly authorized and were just and legal, and that it was not intended to change the members of the board from administrative to judicial officers.

These provisions have already been the subject of judicial consideration, with a result that accords with our views. In the case of Golden v. Health Department of City of N. Y., 21 App. Div. 420, 421, 47 N. Y. Supp. 623, Justice Rumsey says: "It is quite true that it is provided that the action, proceedings, authority, and orders of the board of health shall at all times be regarded as in their nature judicial, and be treated as prima facie just and legal. This provision of the statute has been in existence for many years, but it has never been regarded as making the board of health a court whose orders are final and conclusive. Indeed, it makes no provision for any such thing. The statute prescribes the effect which shall be given to these orders, and that is that they shall be regarded as prima facie legal. Thus much was clearly within the power of the Legislature; and the statute imposes upon persons who question the orders of the board of health in such cases the duty of establishing that the facts upon which they are based do not exist, or that the orders themselves are beyond the authority given to the board by the law. Further than that the statute does not go."

City of Buffalo v. Chadeayne, 134 N. Y. 163, 31 N. E. 443, was an action to recover a penalty for an alleged violation of an ordinance

prohibiting the erection of a wooden building within the fire limits of the city. The common council had passed a resolution giving the defendant permission to erect such building. He thereupon entered upon the construction of the building and incurred liabilities for work and material and had a property interest in them. Thereafter the common council rescinded the permit, and after the defendant had completed the building the city brought action for a penalty. It was held that, after the defendant had entered upon the construction of the building pursuant to the permit, and had entered into contracts and incurred liabilities, he acquired a vested right of property therein of which he could not be deprived. This case is not in conflict with those to which we have referred, but rather is in accord therewith, and illustrates the difference that exists between permits under which a vested right may be acquired and those in which such rights do not vest. One is a permit to construct a building, and the other a permit to peddle milk. To the same effect is Dobbins v. Los Angeles, 195 U. S. 223, 25 Sup. Ct. 18, 49 L. Ed. 169, and City of Lowell v. Archambault, 189 Mass. 70, 75 N. E. 65, 1 L. R. A. (N. S.) 458.

The order should be reversed, and the application for a mandamus denied, with costs in all courts, unless the relator within 20 days elects to demand an alternative writ, in which case the proceedings should be remitted to the Special Term, and the costs should abide the final award of costs.

VANN, J. (dissenting). If the order revoking the license of the relator was an administrative act, no notice to him was required; but, if it was an act done in the exercise of judicial power, notice and an opportunity to be heard were essential before he could be deprived of the right to carry on a lawful business. The Greater New York charter provides that: "The actions, proceedings, authority and orders of said board of health shall be at all times regarded as in their nature judicial and be treated as prima facie just and legal." Laws 1901, p. 500, c. 466, § 1173. While it is difficult to see how all acts of the board of health can be "in their nature judicial," the Legislature had the right to provide that they should be so regarded, and in view of its express command I fail to see how we can hold that the order of revocation was an administrative act. Notice was given in the only case involving the power to revoke that has been before us prior to the one now under consideration. Metropolitan Milk & Cream Co. v. City of New York, 113 App. Div. 377, 98 N. Y. Supp. 894; 186 N. Y. 533, 78 N. E. 1107. While summary action is often necessary in cases affecting the public health, still the danger from delay caused by giving short notice is less than the danger that may arise from action with no notice at all. The respondent should at least have had an opportunity to raise an issue as to whether he had ever been convicted by a court of competent jurisdiction of violating the Sanitary Code, or to show that any judgment of conviction had been reversed or set aside.

Moreover, a license under the police power, as distinguished from the taxing power, involves the right to regulate, but not to prohibit, and it cannot be exercised capriciously or arbitrarily. As the right to revoke is not expressly conferred, but is implied from the right to grant, the rule against arbitrary or capricious action applies with equal force to the revocation of licenses. One of the most effective safeguards against the arbitrary acts of public officials is an opportunity to be heard. The revocation of the respondent's license involved the destruction of his business, which was useful, legitimate, and profitable. Since the power to revoke is not expressly given, but is implied from the power to grant, I think the law also implies that notice must be given before an act can be done which involves such serious loss to the licensee. This involves the conclusion that the revocation of such a license as the one in question is in its essence judicial, independent of the statutory requirement that it shall be so regarded. I vote to affirm.

CULLEN, C. J., and O'BRIEN, EDWARD T. BARTLETT, HISCOCK, and CHASE, JJ., concur with HAIGHT, J. VANN, J., reads dissenting opinion.

SECTION 22.—IN REMOVAL FROM OFFICE

DULLAM v. WILLSON.

(Supreme Court of Michigan, 1884. 53 Mich. 392, 19 N. W. 112, 51 Am. Rep. 128.)

Quo warranto.

CHAMPLIN, J.[40] * * * That issue is whether, under the Constitution and laws of Michigan, the Governor has power to remove a state officer by such action as was taken in this case, viz.: An act of removal evidenced by writing, under the hand and seal of the executive, filed in the executive office, with notice thereof to the officer removed, communicating to him the alleged grounds of removal, but without giving him notice of charges, complaint or claim of official misconduct or neglect of duty, or opportunity of hearing, or defense. * * *

The Constitution (article 12, § 8) provides that "the Governor shall have power and it shall be his duty, except at such time as the Legislature may be in session, to examine into the condition and administration of any public office, and the acts of any public officer, elective or appointed, to remove from office for gross neglect of duty, or for corrupt conduct in office, or any other misfeasance or malfeasance

[40] Only a part of the opinion of Champlin, J., is printed.

therein, either of the following state officers, to wit: The Attorney General, * * * or any other officer of the state, except legislative and judicial, elective or appointed, and to appoint a successor for the remainder of their respective unexpired term of office, and report the causes of such removal to the Legislature at its next session." This provision was not contained in the Constitution of 1835. It was added to the present Constitution, by amendment, by the Legislature of 1862 (Laws 1861, p. 588), ratified by the people in 1862. * * *

It will be observed that the section of the Constitution under consideration only authorizes the Governor to remove for specified causes. He is not authorized to exercise the power at his pleasure or caprice. It is only when the causes named exist that the power conferred can be exercised. It follows as a necessary consequence that the fact must be determined before the removal can be made. It is also clear that the fact must be determined by some tribunal invested with judicial power, for a determination whether specified causes exist is the exercise of judicial functions. Judicial determination of facts must rest upon and be preceded by notice, proof and hearing. And the first question is, what is the proper tribunal in which such facts are to be ascertained? In my opinion this provision of the Constitution requires no legislation to make it effective. Read in the light of the history of the times, and the surrounding circumstances when it was adopted, the grant of power is to the Governor coupled with the duty enjoined to examine into the condition and administration of any public office, and to examine into the acts of any public officer, and to remove from office for gross neglect of duty, or for corrupt conduct in office, any of the officers specified. The amendment for this purpose clothes him with judicial power. It is implied in the grant, and without it the grant would be nugatory and ineffectual to accomplish the purposes for which it was given. * * *

The counsel for the respondent, while granting this, insist that such removal cannot be made without charges, notice and an opportunity for defense, and this I consider the important question in the case.

Unless it is the manifest intention of the section under consideration that the proceedings should be ex parte as well as summary, a removal without charges, notice and an opportunity for defense cannot be upheld. The exercise of such power, in such manner, would be too despotic for any attempt at vindication in a country which boasts of the utmost liberty compatible with the safety of the state, and is entirely opposed to the genius of our free institutions. I do not think the people, when they adopted this amendment, intended or supposed that they were placing such unlimited power in the hands of any man. * * *

In Ramshay's Case, 18 Ad. & El. (N. S.) 190, it was said: "The Chancellor has authority to remove a judge of a county court only on the implied condition prescribed by the principles of eternal justice, that he hears the party accused. He cannot legally act upon such

an occasion without some evidence being adduced to support the charges, and he has no authority to remove for matters unconnected with inability or misbehavior; and where evidence has been given in support of them we think we cannot inquire into the amount of evidence or the balance of evidence, the Chancellor acting within his jurisdiction, being the constituted judge upon this subject." In Williams v. Bagot, 3 B. & C. 786, Mr. Justice Bayley said: "It is contrary to common justice that a party should be concluded unheard." The case of The Queen v. The Archbishop of Canterbury, 1 El. & El. 545, arose under a statute which enacted that a curate, whose license shall have been revoked by the bishop, might "appeal to the archbishop of the province, who should confirm or annul such revocation as to him shall appear just and proper." An appeal was taken to the archbishop, who, without giving the appellant an opportunity to be heard, confirmed the revocation. Lord Campbell said: "No doubt the archbishop acted most conscientiously, and with a sincere desire to promote the interests of the church; but we all think that he has taken an erroneous view of the law. He was bound to hear the appellant, and he has not heard him. It is one of the first principles of justice, that no man should be condemned without being heard." Mr. Justice Wightman said "that, ex debito justitiæ, every one has a right to be heard before he is condemned."

An act of Parliament gave authority to the bishop to decide, upon affidavit or upon his own knowledge, whether or not the duties of the parish had been inadequately performed, in consequence of the negligence of the incumbent, and whenever it should so appear to his satisfaction he could, by certain proceedings, appoint a curate in place of the incumbent. The bishop, proceeding upon his own knowledge, without notice or an opportunity afforded to the incumbent, adjudged that the duties of the vicarage of the parish were inadequately performed by reason of the vicar's negligence, and proceeded to appoint another person to the place. The incumbent refused to surrender to the new appointee. Lord Lyndhurst held that the language of the act imported inquiry, and a judgment as the result of that inquiry. He said: "He is to form his judgment. It is to appear to him from affidavits laid before him; but, is it possible to be said that it is to appear to him and that he is to form his judgment from affidavits laid before him on the one side, without hearing the other party against whom the charge of negligence is preferred, which is to affect him in his character and in his property? That he is to come to that conclusion, without giving the other party an opportunity of meeting the affidavits by contrary affidavits, and without being heard in his own defense—without having an opportunity even of being summoned for that purpose—as in the present instance; there being no summons, for the monition was proceeded in immediately, without any intimation whatever from the bishop of his intention to proceed, to the party against whom that requisition proceeds." And he further held that

when the bishop proceeded, "on his own knowledge, the same course of proceeding is necessary, because a party has a right to be heard for the purpose of explaining his conduct; he has a right to call witnesses, for the purpose of removing the impression made on the mind of the bishop; he has a right to be heard in his own defense." Capel v. Child, 2 Cr. & J. 558.

[The opinion then cites and discusses the following cases: Page v. Hardin, 8 B. Mon. (Ky.) 672; Willard's Appeal, 4 R. I. 601; Com. v. Slifer, 25 Pa. 23, 64 Am. Dec. 680; Meade v. Deputy Marshal, 1 Brock. 324, Fed. Cas. No. 9,372; Chase v. Hathaway, 14 Mass. 222.]

The line of authority is not by any means exhausted, but enough cases have been cited to show that the action of the Governor in this case cannot be upheld as a legal and proper exercise of the power conferred upon him. There must be charges specifying the particulars in which the officer is subject to removal. It is not sufficient to follow the language of the Constitution. The officer is entitled to know the particular acts of neglect of duty, or corrupt conduct, or other act relied upon as constituting malfeasance or misfeasance in office, and he is entitled to a reasonable notice of the time and place when and where an opportunity will be given him for a hearing, and he has a right to produce proof upon such hearing. What length of time notice should be given we do not determine; it must depend, in a great measure upon the circumstances of each case.

I have carefully examined the authorities cited upon the brief of the learned counsel for relator in support of the position that no notice is required to be given, and that the action of the executive is final and conclusive. It is sufficient to say, without commenting specially upon them, that the reasoning of those cases does not commend itself to my judgment. They appear to me to be opposed, not only to the decided weight of authority, but also to the fundamental principles of justice. In what I have said upon the law of this case I have not cast the least imputation upon the motives of the executive. The same presumptions of good faith and honest desire to act within legal and constitutional limits are accorded to him as to either of the other co-ordinate branches of the government, and his motives are not the subject of criticism. I have no doubt that he acted under the impression that he was entirely within the line of his duty as well as of law, and that he believed that the removal of respondent was demanded by the best interests of the public service.

Be that as it may, the relator has not made out a case for the intervention of the court, and judgment must be entered for respondent.[41]

[41] Accord: Com. ex rel. Bowman v. Slifer, 25 Pa. 23 (1855); Ham v. Board of Police of Boston, 142 Mass. 90, 7 N. E. 540 (1886); State v. Hawkins, 44 Ohio St. 98, 5 N. E. 228 (1886); State ex rel. Denison v. St. Louis, 90 Mo. 19, 1 S. W. 757 (1886); State ex rel. Attorney General v. Smith, 35 Neb. 13, 52 N. W. 700, 16 L. R. A. 791 (1892).

WILCOX v. PEOPLE.

(Supreme Court of Illinois, 1878. 90 Ill. 186.)

SHELDON, J.[42] * * * It being found that the power of removal existed in the Governor, the inquiry remains whether it was validly exercised. Relators say not—that the power granted was judicial in its nature, and should have been exercised according to judicial methods; that is, there should have been a specific charge, notice of it, opportunity for defense and hearing, and proof to support the charge. Undoubtedly, the Governor can only remove for some one of the causes specified; but the removal here was for one of these causes—incompetency. The Governor ascertained the existence of the cause here, and made the removal on account of it. The Constitution is silent as to who shall ascertain the case of removal or the mode of its ascertainment. It simply gives to the Governor the power to remove any officer whom he may appoint, in case of incompetency, etc. It follows, then, that it is with the Governor, who is to act in the matter, to determine, himself, whether the cause of removal exists, from the best lights he can get; and, no mode of inquiry being prescribed for him to pursue, it rests with him to adopt that method of inquiry and ascertainment as to the charge involved which his judgment may suggest as the proper one, acting under his official responsibility, and it is not for the courts to dictate to him in what manner he shall proceed in the performance of his duty, his action not being subject to their revision. The Constitution of this state not only declares that the powers of the government of the state shall be divided into three distinct departments, but has expressly prohibited the exercise of any of the powers properly belonging to one by either of the others.

In the case of People v. Bissell, 19 Ill. 229, 232, 233, 68 Am. Dec. 591, where this court discussed very fully the theory of distribution of powers, and the extent of limitations upon each department, it was said: "The Governor is and must be as independent of us as is the Legislature, or as we are of either of them." "When acting within the limits assigned to each, neither can control nor dictate to the others."

The case of People v. Higgins, 15 Ill. 110, is a parallel one with the present, except that the power of removal was exercised there by trustees of an institution instead of the executive, and it covers in principle the precise question here raised, and must, we think, be considered as decisive of it against the relators. The case is a very fully considered one, and contains so full an exposition of the principles applicable to this subject that further enlargement upon them is superfluous. The case involved the title to office of the medical superin-

[42] Only a portion of the opinion of Sheldon, J., is printed.

tendent of the Illinois Hospital for the Insane, an institution founded by the state. The medical superintendent was an officer constituted by the act creating the trustees who, as a body corporate, governed the institution. His tenure of office was for ten years. Under the law, power was given to the trustees to remove the superintendent for infidelity to the trust reposed in him, or incompetency to the discharge thereof. The trustees removed Higgins, the superintendent, by resolution, for the reason alleged that he did not "possess the kind of qualifications which are necessary to the discharge of the duties of said office." It was there insisted, as here, that specific and formal charges should have been preferred against the superintendent, that he should have had a formal notice of the time and place of the trial of the charges, and that a regular trial should have been had upon the testimony of witnesses. To which the court answered: "The statute has made none of these formalities necessary, nor does the common law so interpose and attach itself to the statute as to require them." It was said that the trustees, in determining as to the existence of the cause of removal, might act upon their own observation, and exercising their own best judgment, as well as upon facts detailed by others or upon the opinions of witnesses. The case answers the objection made here, that the executive order of removal is void upon its face, as not stating any lawful ground of removal. In stating the cause of removal, the order has adopted the very language employed in the Higgins Case, which the court held there as describing "incompetency," as being language equivalent thereto—a delicate and inoffensive form of stating that cause of removal. The order, then, does state that cause of removal, the language used to describe it having the warrant of judicial sanction.

In other cases this court has decided that where the law has vested a quasi judicial power, even in subordinate administrative officers, the court will only inquire whether the officer has acted within the power, and will not attempt to substitute its own judgment or discretion for that of the officer, and will not supply any other conditions to the exercise of their discretionary power than such as the law has provided. Spencer & Gardner v. People, 68 Ill. 510; Elliott v. City of Chicago, 48 Ill. 293; Porter v. Rockford, Rock Island & St. Louis R. Co., 76 Ill. 561. The doctrine of these cases applies with added force to a case of executive action. * * *[43]

[43] Accord: State ex rel. Attorney General v. Doherty, 25 La. Ann. 119, 13 Am. Rep. 131 (1873); Keenan v. Perry, 24 Tex. 253 (1859).
See, also, State v. McGarry, 21 Wis. 496 (1868).

PEOPLE ex rel. GERE v. WHITLOCK.

(Court of Appeals of New York, 1883. 92 N. Y. 191.)

Appeal from judgment of the General Term of the Supreme Court, in the Fourth Judicial Department, entered upon an order made October 20, 1882, which affirmed a judgment in favor of defendants, entered upon a decision of the court on trial at Special Term.

This action was in the nature of a quo warranto to try the title of defendants to the office of police commissioners of the city of Syracuse.

On the 29th day of August, 1881, the mayor of Syracuse addressed to each of the relators a written notice that he had removed him from the office of police commissioner, of which he was then an incumbent, by virtue of the act (chapter 559, Laws of 1881), and on the same evening he submitted to the common council a statement of his reasons for such removal, together with a message appointing the defendants to fill the vacancies thereby created. No notice of the mayor's intention had been given to the relators, or to either of them, no charges were presented, and no hearing, or opportunity of hearing, or explanation was afforded to them.

The defendants immediately afterward qualified as such police commissioners, and took possession of the books and papers of the board, and have ever since exercised the duties of the office to the exclusion of the relators.

The statute authorized the mayor to remove from office any commissioner "for any cause deemed sufficient to himself."

DANFORTH, J.[44] * * * The next position of the relators raises a more interesting general question: Whether they were entitled to have notice or be heard before the final action of the mayor. At common law there could be no doubt as to this. Bagg's Case, 11 Coke, 99, Rex. v. Gaskin, 8 Term Rep. 209, and many others cited by the learned counsel for the appellant, stand upon the principle that no one shall be condemned unheard; but this, too, when applied to the term of office, is within the control of the Legislature, and as it gave the power to appoint, may also give the power to remove. Const. art. 10, § 3; People ex rel. Sims v. Board of Fire Commissioners of the City of New York, 73 N. Y. 437. In the act before us (Laws 1881, c. 559, § 1) the power of removal has been expressly conferred upon the mayor, to be exercised as to him shall seem meet. In People ex rel. Mayor v. Nichols, 79 N. Y. 582, cited by the appellant, the statute requires, not only that cause for removal should exist, but also that the officer should have an opportunity to be heard. The statute before us lacks both conditions. No opportunity to be heard is given, and it is enough if the mayor thinks there is sufficient cause. It

[44] The statement of facts is abridged, and only a portion of the opinion of Danforth, J., is printed.

may or may not exist, except in his imagination; but his conclusion is final.

The diligence of appellants' counsel has found no case like it, and those cited by him do not apply. They require either the actual existence of "cause," or "sufficient cause" for removal, and so by implication impose investigation before action, or by express language give a hearing to the accused member or official. Here the removal is to be determined summarily, and is intrusted to the unrestrained discretion of the mayor. Nor is this without a precedent. Among other cases, like power is given to the Governor over the superintendent of public works, and to the latter over his assistant superintendents (Const. N. Y. art. 5, § 3), and to the board of commissioners of the fire department of New York over certain subordinates (Laws 1873, c. 335, § 28). Under that statute it was held that the power of removal was to be exercised at pleasure, except in cases where there was an express limitation to a removal after notice and a hearing, and for cause. People ex rel. Sims v. Board of Fire Com'rs, supra.

We are, therefore, of opinion that no reason for a reversal of the judgment appealed from is shown, and it should be affirmed.[45]

PEOPLE ex rel. FONDA v. MORTON et al.

(Court of Appeals of New York, 1896. 148 N. Y. 156, 42 N. E. 538.)

Appeal from Supreme Court, General Term, Third Department.

Proceedings on the relation of Fred P. Fonda against Levi P. Morton and others for a writ of mandamus. From an order of the General Term, without opinion, affirming an order of the Special Term denying the writ, relator appeals. Affirmed.

ANDREWS, C. J. The relator, an honorably discharged Union soldier, was appointed on the 29th of January, 1888, an orderly in the capitol at Albany, at a salary of $60 a month, and continued to act as orderly until the 28th of February, 1895, when he was discharged by the superintendent of public buildings, with the approval of the trustees, consisting of the Governor of the state, the Lieutenant Governor, and the Speaker of the Assembly. His duties were to wash and clean floors, and to act as policeman and guide in the capitol. After his discharge he applied for a peremptory writ of mandamus directing his reinstatement in his position, claiming that his discharge was unlawful. It appeared from the return to his application that he was discharged for cause, or, as stated therein, for "incompetency and

[45] See Trainor v. Board of Auditors, 89 Mich. 162, 50 N. W. 809, 15 L. R. A. 95 (1891): Supervisors given power to remove officer when in their opinion he is incompetent to execute properly the duties of his office, or when, on charges and evidence, they shall be satisfied that he has been guilty of official misconduct or habitual or willful neglect of duty, construed to permit removal for incompetence without charges, notice, or hearing.

conduct inconsistent with said position." The relator, without denying the fact so alleged in the return, insisted, notwithstanding, that he was entitled to the peremptory writ, and the fact so returned must be taken as true in this proceeding. The discharge of the relator was not preceded by formal charges, or by notice to the relator, or an opportunity to be heard as to the cause of his dismissal. This presents the only question in the case—whether the relator was entitled to a notice and hearing before he could be removed.

By section 4, subd. 3, of the public building law (chapter 227 of the Laws of 1893), which was a substantial re-enactment of chapter 349 of the Laws of 1883, the superintendent of public buildings is authorized, "subject to approval of the trustees, to appoint all persons necessary in the maintenance department of the public buildings and grounds under his charge, and suspend and remove any of them, and prepare rules and regulations for their government." In the appropriation bills passed by the Legislature in each successive year, commencing with 1886, there was inserted in the clause making an appropriation for the care of the public buildings, the salary of the superintendent, and the services of orderlies and watchmen, and other expenses, a proviso that the orderlies and watchmen who should receive any portion of the money so appropriated "shall be persons who are citizens of the state of New York, and who served in the Union army or navy during the late war, and have been honorably discharged therefrom; and such honorably discharged persons shall not be subject to civil service rules of examination." Laws 1886, p. 650. If there was no other legislation affecting the present question, the right to discharge orderlies employed in the capitol, summarily, would admit of no question. The power to remove employés is given, in express terms, by the public building act, to the superintendent, with the approval of the trustees, without qualification; and, even in the absence of such specific power, the rule is well settled that the power to appoint to the public service carries with it, to the appointing power, in the absence of limiting words or of a fixed term, the right to remove the appointee at pleasure. People v. Robb, 126 N. Y. 180, 27 N. E. 267, and cases cited.

But the relator relies upon chapter 716 of the Laws of 1894, which was an act amending chapter 312 of the Laws of 1884, entitled "An act respecting the employment of honorably discharged Union soldiers and sailors in the public service of the state of New York," as containing a limitation upon the power of removal of Union soldiers and sailors employed in the public service, applicable to the position of the relator. The original act of 1884 related to preferences in public employment only, and declared that honorably discharged Union soldiers and sailors, not incapacitated, and possessing the requisite qualifications, should be preferred for appointment and employment in the public departments and upon all public works of the state. This act was amended by chapter 464 of the Laws of 1887 by extending it

so as to subject cities, towns, and villages to the same rule, and a section was added enjoining upon all officials and persons possessing the power of appointment a faithful compliance with the act. The obligation to give preference was, after the passage of the original act and the amendment of 1887, and cognate acts, sought to be enforced in the courts by Union soldiers, applicants for appointment to public office; among others, by an applicant for the office of superintendent of public works of a village (People v. Village of Saratoga Springs, 54 Hun, 16, 7 N. Y. Supp. 125); for employment as court crier (People v. Wendell, 57 Hun, 362, 10 N. Y. Supp. 587); for the office of village attorney (People v. Village of Little Falls [Sup.] 8 N. Y. Supp. 512; Id., 54 Hun, 638, 8 N. Y. Supp. 960); collector of taxes (People v. Barden, 55 Hun, 612, 8 N. Y. Supp. 960); health inspector (People v. Summers, 56 Hun, 644, 9 N. Y. Supp. 700); and in other cases. These attempts generally failed. The relator in such an application could not show that he was entitled in preference to other Union soldiers, and the decision of the appointing power as to fitness, actual or relative, must generally, from the nature of the case, be final. This court in People v. Lathrop, 142 N. Y. 113, 36 N. E. 805, had occasion to consider whether the act of 1884, giving preferences in public employments to Union soldiers and sailors, limited the power of removal of a Union soldier, who held a public employment; and the court held that it affixed no restriction on this power, and in no way affected the power of removal, as it existed independently of the act.

The amendment of 1894 for the first time introduced into the act a restriction on the power of removal of Union soldiers and sailors employed in the public service. The first section of the act of 1884 was amended so as to read as follows: "Section 1. In every public department and upon all the public works of the state of New York, and of the cities, towns and villages thereof, and also in non-competitive examinations under the civil service rules, laws or regulations of the same, wherever they apply, honorably discharged Union soldiers and sailors shall be preferred for appointment and employment; age, loss of limb or other physical impairment which does not in fact incapacitate, shall not be deemed to disqualify them, provided they possess the business capacity necessary to discharge the duties of the position involved. And in all cases the person having the power of employment or appointment, unless the statute provides for a definite term, shall have the power of removal only for incompetency and conduct inconsistent with the position held by the employé or appointee; and in case of such removal or such refusal to allow the preference provided for in this act of and for any such honorably discharged Union soldier, or sailor, or marine, for partisan, political, personal or other cause except incompetency and conduct inconsistent with the position so held, such soldier, sailor or marine so wrongfully removed or refused such preference, shall have a right of action in any court of competent jurisdiction for damages as for an

act wrongfully done, in addition to the existing right of mandamus; the burden of proving such incompetency and inconsistent conduct as a question of fact, shall be upon the defendant. But the provisions of this act shall not be construed to apply to the position of private secretary or deputy of any official or department, or to any other person holding a strictly confidential position."

It is apparent that the legislation culminating in the act of 1894 has nothing primarily to do with what is called the "civil service system." It was intended to create a privileged class, entitled to preferential employment in subordinate positions in the public service, the foundation of the preference being meritorious service as soldiers and sailors in the war for the preservation of the Union. The original act, which provided for a preference only in the original appointment or employment, but gave no security of tenure, was supplemented in this respect by the amendment of 1894. The legislation as it now stands not only gives a preference in public appointments and employments to Union soldiers and sailors, but makes the appointees irremovable, except upon the particular grounds specified. The removal clause was intended to prevent interference with their tenure for political or partisan or personal reasons. But the statute recognized the principle that incompetent persons, or those whose conduct was inconsistent with the discharge of their duties, should not be retained in the public service, however meritorious their prior service may have been. The statute operates as a limitation upon the power of removal, which must be observed by the officers or body having the appointing power, and it enacts special remedies for its violation.

In the present case the removal was made for the cause specified in the statute, and nothing appears upon the record tending to show that the power was not exercised in good faith, and in the public interest. The claim that the relator was entitled to prior notice and hearing is not supported by any language in the act. If he was so entitled, it results from some general rule of law implied from the fact that the power of removal was not unrestricted, but could only be exercised for the causes specified. It is important to notice the scope of such an implication, if it exists under the statute in question. The act applies to employés of every grade in the public service or on the public works of the state, and the cities, towns, and villages thereof. The preference is given, not only in clerical or other subordinate positions, but to every person seeking public employment as a laborer on the canals, or on the streets of a city, or in any capacity, however humble. If employment once secured can only be terminated after a notice and hearing, and something akin to a formal adjudication upon evidence, the system would become almost intolerable. Many things difficult to define in words, which show incompetency in an employé, or disregard of his duty, and which would justify dismissal in the mind of a reasonable employer, would often elude a

formal investigation. There are many statutes on the statute book relating to the employment and removal of police officers, clerks, and employés in municipalities, which expressly or by implication require that the power of removal shall only be for cause, after notice and hearing of the person whose removal is contemplated. The practice of legislation in this state has been to insert a provision for notice and hearing when this has been intended. City of New York, Consolidation Act (Laws 1873, c. 335) § 25; Id. (Laws 1882, c. 410) §§ 250, 272, 314; City of Brooklyn, Laws 1888, c. 583, tit. 22, § 29; City of Buffalo, Laws 1870, c. 519, tit. 13, § 3.

The acts cognate to the act of 1894, viz. chapter 119 of the Laws of 1888 and chapter 577 of the Laws of 1892, restricting the power of removal of Union soldiers or sailors holding official employment in cities and counties, contain a provision that removals shall not be made "except for cause shown after a hearing had." In view of the course of legislation, and the scope of the act of 1894, we are of opinion that the Legislature intentionally omitted to insert a similar provision in the statute in question.

We concur in the conclusion of the General Term that the Legislature, having prescribed the grounds of removal in the act of 1894, left it to the removing power to determine whether the facts existed which authorized a removal, subject to responsibility for any willful or perverse action, and that no notice is required to be given to the person whose removal is contemplated, before the power can be exercised.

The order should be affirmed. All concur. Order affirmed.[46]

SECTION 23.—SUFFICIENCY OF NOTICE

STATE v. LAMOS.

(Supreme Court of Maine, 1846. 26 Me. 258.)

TENNEY, J. The defendant is charged in the indictment with the offense of presuming to be and of being a common innholder, between the 1st day of June and the time of finding the bill at the term of the court holden in October, 1843, without being licensed therefor according to law, and without being duly authorized therefor. It was admitted by the defendant that he carried on the business of a common innholder as alleged in the indictment, and by the prosecuting officer that he was duly licensed as such for the period during which

[46] See In re Guden, 171 N. Y. 529, 64 N. E. 451 (1902). See, also, Shurtleff v. United States, 189 U. S. 311, 23 Sup. Ct. 535, 47 L. Ed. 828 (1903).

the offense was alleged to have been committed, with the restriction not to sell spirituous liquors. But it was insisted by the latter that the defendant's license was legally revoked on August 5, 1843.

The defendant not being charged with any other offense than that of being a common innholder without license, the correctness of the instructions to the jury, that the evidence authorized a conviction, must depend upon the legal revocation of that license. The town officers, who are authorized to grant a license, are empowered also to revoke it, whenever any instance of a breach of the bond required by Rev. St. c. 36, § 2, shall have come to their knowledge, and after complaint, notice to the party complained of, and a hearing thereon. Chapter 36, § 15.

The power given by the section referred to, to the board, is important, and its exercise may materially affect the interests of those against whom complaints may be made. Their jurisdiction, like that of all inferior magistrates, must appear affirmatively, and cannot be presumed, or inferred. The authority to give a hearing, and to revoke a license, is not conferred without a complaint, and a notice to the party complained of.

It is not necessary that the complaint should be in writing, signed and sworn to as the law requires in complaints in criminal proceedings before a magistrate, to authorize him to issue a warrant; neither is it indispensable that it should be signed by any one; but the language used in the statute implies that the word "complaint" is to be understood in its legal sense.

A breach of the bond of a person licensed may come to the knowledge of the board. This alone is not sufficient to give a hearing after notice; but a complaint is necessary. The Legislature could not have intended to have made a distinction between simple information of the breach, and that information given verbally to the board, by way of complaint. Such would be senseless. But it was evidently their purpose that after the fact of a breach should become known to them, before they could give the notice to the person accused of having committed it, and proceed to a hearing, the complaint should be in writing and contain an allegation of the charges, with specifications, and the time when the breach took place. Of all these the party complained of was entitled to reasonable notice, that he might know particularly what he was called upon to answer, and have opportunity to produce proof that the charges were unfounded. Without this, there would be a looseness which would be perfectly anomalous in all proceedings of the same general character. There would be an uncertainty whether the evidence adduced at the hearing had relation to the charges of which he had notice, or others, which were distinct therefrom. If the license should be revoked, it could not appear whether it was upon satisfactory proof of the charges alleged, when no record or document existed to show what they were.

The order revoking the defendant's license is in writing, and it is

therein stated that the undersigned, being a major part of the licensing board, after notifying him of their intention so to do, gave him a hearing on the charges preferred against him, and being satisfied, beyond a reasonable doubt, that he has failed to keep the Wadleigh House, according to the restrictions and conditions of his bond and license, did revoke said license, rendering it of no effect, informing him at the same time of the fact. No written complaint or copy thereof was introduced at the trial as the basis of the proceedings of the board, nor was there evidence that any was before them at the hearing. The order of revocation was introduced without objection, but if it contained no statement showing a jurisdiction in the board, it certainly was insufficient for that purpose; and it contains nothing which indicates that they proceeded under a written complaint. It does not state what charges were preferred against the defendant; and they could have jurisdiction only on complaint of a charge that the condition in the bond, which the law authorized them to insert, had been broken. Crosby v. Snow et al., 16 Me. 121.

The board found the defendant guilty of not keeping the Wadleigh House according to the conditions and restrictions of his bond and license, and for that cause his license was revoked. Whether this was the charge preferred against him or not, or whether the conditions and restrictions in the bond and license, which they found he failed to observe were those which could be legally required, even if written complaint was not necessary, no proof was adduced to show.

Exceptions sustained.[47]

PEOPLE ex rel. SHUSTER v. HUMPHREY et al.

(Court of Appeals of New York, 1898. 156 N. Y. 231, 50 N. E. 860.)

Appeal from Supreme Court, Appellate Division, Second Department.

Application by the people, on the relation of Adam Shuster, for a writ of certiorari against William A. Humphrey and others, Commissioners of Police of the City of Poughkeepsie. From an order of the Appellate Division, made by a divided court (22 App. Div. 632, 48 N. Y. Supp. 1112), affirming a dismissal of relator from the police force of the city of Poughkeepsie, he appeals. Reversed.

VANN, J. On the 15th of April, 1895, the relator was appointed a patrolman of the city of Poughkeepsie, after passing the civil service examination as provided by law. He was a veteran of the Civil War, and had never served in the Confederate army or navy. After

[47] See, also, State v. Kellogg, 14 Mont. 426, 36 Pac. 957 (1894); Lillienfeld's Case, 92 Va. 818, 23 S. E. 882 (1896); State ex rel. Sullivan v. Tomah, 80 Wis. 198, 49 N. W. 753 (1891); Pehrson v. Ephraim City, 14 Utah, 147, 46 Pac. 657 (1896); Czarra v. Board of Medical Supervisors, 24 App. D. C. 251 (1904).

serving two years in the Union army and receiving an honorable discharge, he enlisted in the navy, and served until the close of the war, when he was honorably discharged from that branch of the service also. On the 5th of May, 1897, he was charged by the mayor of the city "with having made an illegal arrest, in that, without a warrant and without probable cause, he, on or about April 23d, 1897, illegally arrested and detained and brought to the station house one Lewis Richardson, and declined to make a charge against him, whereupon said Richardson was discharged by the sergeant in charge." On the 7th of May following, he was tried upon this charge, and evidence was given tending to show that he made an arrest, without a warrant, for a misdemeanor not committed in his presence, upon the complaint of a man who claimed that the person arrested had assaulted him, and that he was drunk and disorderly. At the instant that this complaint was made, the alleged wrongdoer was running away, and the relator placed him under arrest, and took him to police headquarters, with the understanding that the complainant was to follow immediately, and make a formal complaint. Upon arriving at the police station, the relator declined to make any charge himself against the prisoner, who, as the complainant did not appear, was discharged, after a detention not exceeding five minutes in duration.

As the relator was an honorably discharged soldier, and had never served in the Confederate army or navy, the commissioners had no power to remove him "except for cause shown after a hearing had." Laws 1892, c. 577. The charter of the city of Poughkeepsie, which is a public act, provides that the board of police commissioners of that city have power "to punish any member of the police force on conviction of any legal offense, or neglect of duty, or violation of rules, or absence without leave, or any conduct injurious to the public peace or welfare, or immoral conduct, or conduct unbecoming an officer, or other breach of discipline, by reprimand, forfeiting or withholding pay for a special time, or dismissal from the force, but no more than thirty days' pay shall be forfeited for any offense." Laws 1896, c. 425, §§ 141, 193.

The relator was entitled to a trial upon charges preferred, and the commissioners had no right to remove him until after they had duly convicted him on one or more of such charges. This is necessarily implied from the words "hearing," "cause shown," "conviction," etc., as used in said statutes. After a lawful conviction upon a definite charge made under the statute, they had the right to remove him for that "cause shown," but they had no right to remove him for a cause not appearing in the charge preferred, and not embraced in the issue that was tried. They could not convict him of one thing, and remove him for another. If they convicted him of making an illegal arrest, they could not remove him on that ground, and on one or more other grounds not embraced in the charge nor covered by the evi-

dence; yet this is what the commissioners, according to their return, actually did. Their minutes, which are part of the return, show that, at the close of the evidence, a motion was made, seconded, and unanimously carried, "that Officer Shuster be dismissed from the force for incompetency and trying to deceive the board." According to this statement of their official action, which is all that appears on the subject in their original minutes, the commissioners do not appear to have convicted the relator upon the charge preferred, or to have dismissed him on that ground, but upon two independent grounds, as to neither of which was there a trial or hearing. In another part of their return, however, the commissioners state that, "after the testimony had been taken, the board unanimously found the relator guilty of the charges, and dismissed him from the force because of such finding, and for incompetency and endeavoring to deceive the board." This was not an entry upon their minutes or a record made at the time of their official action, but a statement framed in response to the command of the writ of certiorari.

Assuming that the charge of making an illegal arrest was sufficient to justify a conviction, and assuming also that the board actually convicted the relator of that offense, still no charge of incompetency or endeavoring to deceive the board was made against him, and he was neither tried nor convicted upon either of those grounds. Yet the learned commissioners themselves say that they removed him for incompetency and an attempt to deceive them, which were not charged, as well as for an illegal arrest, which was charged. The punishment which they inflicted was the most severe that the law authorizes, and we are compelled to assume that, in fixing the penalty to be inflicted, the incompetency and deceit had an influence upon their minds. If it did not, why did they say so in their return, and why did they formally enter upon their minutes the charges not preferred and never tried, as the only grounds upon which they acted in dismissing the relator from the force?

We can hardly conceive that the commissioners, as reasonable men, would dismiss a patrolman who was in good standing, so far as the record discloses, simply because he made an honest mistake in arresting a man without a warrant when he had no right to do so. The arrest was not accompanied by actual violence, nor by any aggravating or annoying conduct, and the prisoner was deprived of his liberty for only a short time. Even if a dismissal, based solely upon a conviction for making the arrest, would be a reasonable punishment, under the circumstances, the record does not permit the inference that the removal was founded upon that charge alone, for the commissioners say that they dismissed him for other reasons also. The return compels us to conclude that, in fixing the punishment to be inflicted, they were influenced to some extent, at least, by the "incompetency" and the effort at deceit, in relation to which there was neither charge preferred nor trial had. As we have recently said: "The relator was

not subject to removal except for some legal cause, to be ascertained and adjudged as matter of fact upon a hearing." People v. Police Commissioners, 155 N. Y. 40, 44, 49 N. E. 257. Yet he has been adjudged guilty of one offense, and removed for three offenses, of two of which it does not appear that he had ever heard. We think that the commissioners exceeded their power, and that the order appealed from should be reversed, with costs.

PARKER, C. J., and O'BRIEN, BARTLETT, and MARTIN, JJ., concur with VANN, J., for reversal. GRAY, J., concurs with HAIGHT, J., for affirmance.

Order reversed.

STATE ex rel. MEADER et al. v. SULLIVAN et al.

(Supreme Court of Ohio, 1898. 58 Ohio St. 504, 51 N. E. 48, 65 Am. St. Rep. 781.)

Error to circuit court, Hamilton county.

Petition for writ of quo warranto by the state, on the relation of Meader and others, against John J. Sullivan and others. A demurrer to the answer was overruled, and the petition dismissed. Relators bring error. Affirmed.

The action below was in quo warranto, brought by the prosecuting attorney of the county of Hamilton against the defendant in error Sullivan and John Zumstien, Louis Werner, and George M. Roe. Its purpose was to oust respondents from the office of board of supervisors of the city of Cincinnati, and to induct the relators. The gravamen of the petition is that the respondents had been removed from office by the mayor of the city by virtue of section 2690m, Rev. St. 1897, after a hearing upon charges preferred, and yet respondents continued to intrude therein.[48]

SPEAR, C. J. (after stating the facts). Two questions are presented. One relates to the sufficiency of the charges; the other to the action of the mayor upon them. The holding of the circuit court is rested upon the former consideration.

Section 2690m, Rev. St. 1897, gives authority to the mayor to appoint the board of supervisors, and also to remove. The latter authority is in these words: "For neglect of duty or misconduct in office, the mayor of such city may remove any member of said board." This language, taken by itself, may imply an arbitrary power of removal. But that the power is not wholly arbitrary is well settled in this state by the cases of State v. Hawkins, 44 Ohio St. 98, 5 N. E. 228, and State v. Bryson, 44 Ohio St. 457, 8 N. E. 470. Nor can its exercise be lawfully attempted until substantial charges involving neglect of duty or official misconduct, have been preferred. It is held in the former case, as applicable to a removal by the Governor, that the charges must

[48] The rest of the statement of facts is omitted.

embody facts which, in judgment of law, constitute official misconduct, and no reason is perceived why the same strict test should not apply in the case of removal by a mayor. While it is true that the holding of office is not compulsory, and the citizen is at liberty to accept or decline, as seems to him best, yet considerations of patriotism and public policy incline the disinterested citizen to accept, and it is manifestly for the interest of the state that men of character should be found willing to fill, public positions. Such citizens will be less likely to do so if they are to be subjected to arbitrary removal, or their reputations put in jeopardy by removal based upon insufficient charges. The public interests do not require action which shall be unjust to a worthy officer, or which will unfairly smirch a good character; and yet the public interests do require prompt action in case of established inefficiency or corruption. And so our statutes have provided remedies as to removals which, while they do not lodge power in the removing authority which is absolutely arbitrary, do give power which partakes of that character.

In a case under the statute in question the mayor is the sole judge of the weight and sufficiency of the evidence given at the hearing. If he hears a complaint of neglect of duty or misconduct in office, upon adequate charges, and upon evidence tending to establish them, by him adjudged sufficient, removes the officer, his action is practically final, since no appeal lies, nor can error be prosecuted. Hence the necessity, in justice and common fairness, of his being authorized to proceed only when charges have been made which embody facts that, in judgment of law, constitute neglect of duty or misconduct in office. As said by Mechem in his work on Public Officers (section 452): "The power of removal so conferred must be confined within the limits prescribed for it, and must be pursued with strictness. Hence it can be exercised only for the cause specified and in the manner and upon the conditions fixed." See, also, Com. v. Slifer, 25 Pa. 23, 64 Am. Dec. 680. And, with equal propriety may it be added that the finding and order should be so definite as to show upon the face of them, that the power has been exercised according to law. This for the reason, among others, that the power exercised by the mayor is not judicial power, and the presumptions which attach to the record of courts are not to be applied in the same liberal sense to the record of the mayor. In McGregor v. Supervisors, 37 Mich. 388, it is held by Cooley, C. J., that "the removal from public office is a matter of serious consequence, and it is plain that all the facts which would justify it ought properly to be of record."

The charges here are that Sullivan knew, or should have known, that the tangible property, real and personal of the street railway company, subject to taxation, was $10,000,000. Yet he willfully consented to approve the valuation of personal property at $835,230, and realty at $350,000, when he knew that the value of the said taxable property was not less than $10,000,000; with bad intent, etc. A simi-

lar allegation is made as to the property of the gas company. But the board, acting as a board of equalization, had, under the statutes, no duty to perform respecting real estate, its power of equalization being confined wholly to personal property; and why the confusing element as to real estate was incorporated in the charges must be left to conjecture. It so confuses the allegation that its meaning is fatally obscure. There is no statement that Sullivan or the board undervalued the personal property, for there is no language equivalent to an averment that the personalty of the railway company was in fact of higher value than $835,230. The valuation in gross appears by the charges to have been much too low. But it may be, for anything that these charges show to the contrary, that the undervaluation was wholly on the real estate. So that, as conclusion, every word in the charges as made may have been true as therein alleged, and yet no neglect of duty would be shown.

The finding of the mayor is simply that "Sullivan has been guilty of neglect of duty." This finding, being general, cannot be extended by implication to involve a conclusion more comprehensive or specific than the language of the charges; and this, as we have found, means only that as to the whole property there was undervaluation. In other words, the legal meaning of the finding and order is that, in the judgment of the mayor, the defendant was guilty of neglect of duty because he had permitted undervaluation of the property in gross, and cannot be held equivalent to a finding that he had been so guilty with respect to that part only of the property of which the board had jurisdiction. It seems to us manifest that, considering the arbitrary character of the power brought into exercise in this case, the charges were too indefinite to justify a trial, and that, unaided by a specific finding showing in what the neglect of duty consisted, the entire record is not sufficient to support an order of removal.[49] * * *

JOYCE v. CITY OF CHICAGO.

(Supreme Court of Illinois, 1905. 216 Ill. 466, 75 N. E. 184.)

HAND, J.[50] * * * It is also urged that the charge filed with the commission by the general superintendent of police is not sufficiently specific. This proceeding is not a common-law or criminal proceeding, but an investigation. While the plaintiff in error had the right to have the charge preferred against him reduced to writing, and in such form that he could clearly understand the ground assigned for his removal, it was not necessary that the charge should be formulated in technical language similar to that of a declaration or indictment.

[49] The remainder of the opinion is here omitted. See post, p. 214.

[50] Only a portion of the opinion of Hand, J., is printed.

In State v. Common Council of the City of Superior, 90 Wis. 612, 64 N. W. 304, charges were filed with the common council against the mayor of the city for extorting sums of money from policemen and firemen for political purposes. After a hearing upon the charges, the common council removed the mayor from office. Under the Wisconsin statute the mayor could not be so removed "without cause, nor unless charges are preferred against him and an opportunity given him to be heard in his own defense." The court, on page 622, 90 Wis., and pages 306, 307, 64 N. W., said: "This was not a common-law trial, but an investigation. While the mayor had a right to insist that he have a fair hearing, and that the substance of the rules governing trials at law should be preserved, he cannot require that the same precision and formality be observed which are required in criminal trials at law. These principles govern the charges made, as well as the procedure. The charge does not need to be drawn with the accuracy of an indictment. It is sufficient if the accused be furnished with the substance of the charge against him." Upon the trial the plaintiff in error was represented by counsel, and no objections, as appears from the record filed as a return, were made to the written charge for indefiniteness or otherwise, and it is too late now for him to raise the objection that the complaint was not sufficiently specific.

In State v. Kirkwood, 15 Wash. 298, 46 Pac. 331, the relator was removed from the office of police commissioner of the city of Seattle by the mayor upon charges, and Kirkwood was appointed in his place. The relator brought suit, in the form of an information in the nature of a quo warranto, to oust Kirkwood. The court held that in a quo warranto proceeding it could examine the sufficiency of the charges, and said (page 300, 15 Wash., and page 332, 46 Pac.): "The second contention of appellant, however, viz., that the charges were sufficient to support the removal of relator, we think must be sustained. These charges may have been somewhat indefinite, but no motion was made to make them more definite or certain. No objection was made to them in any way. The appellant went to trial upon the complaint as it was, and the issues were found against him, and we think it is too late for him now to raise the objection that the complaint was indefinite and not specific. * * * The complaint * * * is somewhat discursive and indefinite, but we think sufficient can be gathered from the complaint to place the relator upon trial for acts which were inconsistent with the duties of a public officer." * * *

CHAPTER V

HEARING AND EVIDENCE

SECTION 24.—IN CONNECTION WITH LICENSES

PEOPLE ex rel. PRESMEYER v. BOARD OF COM'RS OF POLICE AND EXCISE OF CITY OF BROOKLYN.

(Court of Appeals of New York, 1874. 59 N. Y. 92.)

Appeal from order of the General Term of the Supreme Court, in the Second Judicial Department, affirming an order of Special Term, denying a motion on behalf of the relator that a writ of prohibition issue, commanding respondents to desist from proceedings to cancel relator's license for the sale of intoxicating liquors.

The relator had obtained a license from the said board. A complaint was made to the board against him, under section 8, c. 549, Laws 1873, for selling beer on Sunday, by a sergeant of the police, of which complaint the following is a copy:

"Brooklyn, Feb. 9, 1874.

"John S. Folk, Superintendent of Police:

"I hereby report George H. Presmeyer, keeper of liquor saloon corner of Fifth avenue and Twenty-Sixth street, for violation of excise law, at 8:15 p. m., on the 8th instant. Six men were in the store at the time; two classes of beer on the counter.

"Smith Hall, Sergeant in Command."

Thereupon the board summoned relator to show cause before them why his license should not be revoked as prescribed by said section. The relator appeared and protested against further proceedings, on the ground that the board had no jurisdiction, and that the complaint preferred alleged no violation of the excise law. These objections were overruled by the board.

GROVER, J.[1] * * * The counsel further insists that section 8 is unconstitutional, for the reason that it authorizes the conviction of a party of a crime without a trial by jury. But it authorizes nothing more than an inquiry into and determination of the question, whether the party licensed continues to be a suitable and proper person to sell intoxicating liquors, the statute itself determining that a violator of the excise laws, while holding a license, is not such a person. That

[1] Only a portion of the opinion of Grover, J., is printed.

the power to license the sale of intoxicating liquors and to cancel such license when granted is vested in the Legislature, has been determined by this court. Metropolitan Board of Excise v. Barrie, 34 N. Y. 657. The mode and manner in which this shall be done rests in the discretion of that body.

The order of the General Term, affirming the order of the Special Term denying a writ of prohibition, must be affirmed with costs. All concur.

Order affirmed.[2]

GAGE v. CENSORS OF NEW HAMPSHIRE ECLECTIC MEDICAL SOCIETY.

(Supreme Court of New Hampshire, 1884. 63 N. H. 92, 56 Am. Rep. 492.)

Petition for a writ of mandamus. Facts found by a referee.

SMITH, J. The petitioner alleges that having pursued the prescribed course of study, and having upon due examination been graduated from the Eclectic Medical College of the city of New York, a legally chartered school authorized to confer degrees in medicine and surgery, and having received a diploma from said college, he presented himself before the defendants, a board of censors of the New Hampshire Eclectic Medical Society, January 4, 1882, and made application to the board for a license to practice medicine, surgery, and midwifery, in this state, representing that he had pursued the prescribed course of study and graduated from said college, and produced his diploma, and offered himself for such examination as the defendants might desire to make; that the defendants refused his application, declined to give him a hearing, and refused to grant him a license. The petitioner prays for a writ of mandamus commanding the defendants to issue to him a license to practice medicine, surgery, and midwifery, in this state, and for further relief.

The defendants answer, admitting that they are the board of censors of the New Hampshire Eclectic Medical Society. They deny that the petitioner pursued the prescribed course of study, or that he was graduated upon due examination from said medical college, or that the college was legally chartered or authorized to confer degrees in medicine and surgery, or that the petitioner had a regular and proper degree from the college as alleged. They admit the other allegations of the petition, but say that the reason for their refusal to issue a license to the petitioner was because it clearly appeared to and was understood by them that the petitioner was disqualified and unfit to prac-

[2] Accord: Cherry v. Commonwealth, 78 Va. 375 (1884).

See Com. v. Wall, 145 Mass. 216, 13 N. E. 486 (1887), licensee duly notified may be proceeded against in his absence.

See, however, In re Peck, 167 N. Y. 391, 60 N. E. 775, 53 L. R. A. 888 (1901).

tice medicine, surgery, and midwifery, that he was unworthy of public confidence, and that it was clearly apparent to them that if a license was granted it would be their duty to revoke such license immediately for the reasons stated.

The referee finds that the petitioner graduated from the Eclectic Medical College of New York City, a medical school authorized by the laws of New York to confer degrees in medicine and surgery; that he received a diploma from the college, March 4, 1880, after having pursued the prescribed course of study and upon due examination; that he applied to the defendants January 4, 1882, for a license, and offered his diploma as evidence of his graduation; that the defendants refused to grant the petitioner a license, or to examine his diploma, or to examine him as to his qualifications; and that they put their refusal mainly upon the ground that the petitioner is not worthy of public confidence.

The statute requires every medical society, organized under the laws of this state, to elect a board of censors consisting of three members. Authority is conferred upon the board to examine and license persons to practice medicine, surgery, or midwifery. It is made the duty of the board to issue licenses without examination to all persons who furnish evidence by diploma from some medical school authorized to confer degrees in medicine and surgery, when the board is satisfied that the person presenting such diploma has obtained it after pursuing some prescribed course of study and upon due examination. The board has power, upon due notice and hearing, to revoke any license granted by it, when improperly obtained, or when the holder has, by conviction for crime or from any other cause, ceased to be worthy of public confidence. Gen. Laws, c. 132, § 2. The defendants allege as a reason for refusing a license to the petitioner that he is not "worthy of public confidence," and claim the right under the statute to refuse to issue a license if satisfied that either of the causes exists which authorize them to revoke it.

The object of the statute is protection to the public from incompetent and unworthy physicians and surgeons. Two classes of persons are mentioned in the statute to whom a license to practice medicine, etc., may be issued—those who have and those who have not received a diploma from a medical school authorized to confer degrees. To the latter class the license is issued upon examination; to the former class, without examination. Authority to examine and license, as expressed in the statute, means authority to license, when, upon examination of the candidate as to his medical education, skill, and experience, the censors are satisfied that he possesses the necessary qualifications for the important and responsible occupation of a medical practitioner. When the candidate has received a diploma from a medical school, he has only to satisfy the board that it was conferred by a school authorized to confer degrees in medicine and surgery, and that it was conferred after he had pursued the prescribed course of

study, and upon due examination by the authorities of the school. The statute makes such a diploma conclusive evidence to the censors that he possesses the requisite medical qualifications to practice medicine, surgery, and midwifery. Hence the provision that he shall receive a license without examination; that is, without examination as to his medical qualifications.

The statute also contemplates that the exigency may arise when the holder of a medical license may become, or may prove to have been, unfit or unqualified to practice medicine, and for that reason that his license should be revoked. The license is in effect a certificate that the holder possesses the necessary medical and other qualifications. The license may be revoked when it was improperly obtained, or when the holder has, by conviction for crime or from any other cause, ceased to be worthy of public confidence. Character, no less than medical education, skill, and experience, is, within the meaning of the statute, a qualification for a competent physician or surgeon. One who does not possess the requisite qualifications cannot be worthy of public confidence. Barrows v. Mass. Med. Soc., 12 Cush. (Mass.) 402, 409; Rex v. Dr. Askew et al., Censors, etc., 4 Burr. 2186, 2189; Com. v. Philanthropic Soc., 5 Binn. (Pa.) 486. But a license once granted cannot be revoked except upon due notice and a hearing. The holder is given an opportunity to meet charges and evidence tending to show his unfitness. The same considerations that forbid the revocation of a license, except upon notice and a hearing, also require that the applicant for a license who possesses the requisite medical qualifications shall not be denied a license without a hearing on the question whether he is in other respects worthy of public confidence.

It is said that mandamus does not lie to compel admission to a corporate franchise, or to an office, when it is plainly apparent that the applicant, if admitted, will be immediately expelled; that in such a case the writ may be properly withheld; and that the writ is not intended to enable a party, by taking advantage of forms or the want of form, to defeat justice. High, Ex. Rem. §§ 287, 301; Ex parte Paine, 1 Hill (N. Y.) 665; Rex v. Griffiths, 5 B. & Ald. 731; Rex v. Axbridge, Cowp. 523; Rex v. Mayor, etc., of London, 2 T. R. 177, 182; Rex v. Bishop of Chester, 1 T. R. 396, 403; Van Rensselaer v. Sheriff of Albany, 1 Cow. (N. Y.) 501; State v. Society, 15 La. Ann. 73. What the common law of this state is on that subject it is not now necessary to inquire. This case depends upon the statute, which does not authorize the exclusion of the plaintiff from the rights of a licensed physician without trial.

An examination for the purpose of ascertaining his medical and surgical knowledge and skill is rendered unnecessary by his diploma from a medical school authorized to confer degrees in medicine and surgery, the board of censors being satisfied that he obtained his diploma after pursuing the prescribed course of study and upon due examination. He is exempted by the statute from the examination

which would be required if he had no diploma. But the legal meaning of the statute does not require the issue of a license which should be immediately revoked for want of other qualifications than medical and surgical knowledge and skill. A license may be refused, if, on other grounds, upon due notice and hearing, he is fairly proved by the defendants to be unworthy of public confidence. If he desires a hearing before the defendants on that question, further proceedings in this case will await the result of the speedy trial to which he is entitled before the board.

Trial granted. All concurred.[3]

UNITED STATES ex rel. ROOP v. DOUGLASS.

(Supreme Court of District of Columbia, 1890. 19 D. C. 99.)

Hearing in the first instance in General Term, on a return to a petition for mandamus to the Commissioners of the District of Columbia commanding them to issue or cause to be issued to the relators a retail liquor license. Writ refused.

JAMES, J.[4] * * * It was next objected that, notwithstanding a decision by one having discretionary power is conclusive when it is the consequence of a proper examination, it is not so when the examination appears to have been improperly conducted, and that, as a matter of fact, the examination in this case was not conducted properly or lawfully.

It appears by the return that the respondents received, as aids in forming their judgment, the unsworn reports of the police officers, and by the uncontradicted averments of the petition that they denied the petitioners a rehearing as to the truth of these reports. The methods of the respondents are impeached on the ground, apparently, that they were arbitrary in excluding a formal contest. To what methods, then, were the Commissioners limited? The interests and wants of the public, and not any pre-existing right of the petitioners, were the subjects which they were charged to ascertain, when application was made for license. Therefore, their mode of inquiry, and of satisfying their own judgments, was not subject to the rules which apply to the ascertainment of disputed private rights.

As no mode of inquiry is prescribed by the statute, the Commissioners are, by implication, authorized to adopt any that may reasonably be used in attaining the end in view. They were the head of a police

[3] See Queen v. Justices of Walsall, 3 Common-Law R. 100 (1854); Ex parte Kavanagh, 10 Times L. Rep. 533 (1894); In re Schomaker, 15 Misc. Rep. 648, 38 N. Y. Supp. 167 (1895), hearing a matter of custom and courtesy. Right of remonstrants to be heard. Steinkraus v. Hurlbert, 20 Neb. 519, 30 N. W. 940 (1886).

[4] Only a portion of the opinion is printed.

force, which it was their duty to employ in watching over good order and preventing crime. The facts which might determine their approval or disapproval of a license, such as the assembling of disorderly persons, were the very matters which it was the duty of their subordinate officers to observe. It was not only reasonable, then, that they should derive information from that source, in aid of their executive discretion, but it may even be said to be an intendment of law, in every system of executive discretion, that the executive head may act upon mere information derived from his accountable subordinates.

This difference between an inquiry into disputed private rights and an inquiry intended simply to ascertain the interests of the public was considered and well stated in Raudenbusch's Appeal, 120 Pa. 342, 14 Atl. 150. Mr. Justice Paxson, speaking for the court, there said: "The law of the land has decided that licenses shall be granted to some extent, and has imposed the duty upon the court [of sessions] of ascertaining the instances in which the license shall be granted. In order to perform this duty properly, the act of assembly has provided means by which the conscience of the court may be informed as to the facts. It may hear petitions, or remonstrances, or witnesses; and we have no doubt the court may in some instances act upon its own knowledge. The mere appearance of an applicant for license, when he comes to the bar of the court, may be sufficient to satisfy the judge that he is not a fit person to keep a public house. The judge is not bound to grant a license to a man whom he knows to be a drunkard or thief, or has actual knowledge that his house is not necessary for the public accommodation. The object of evidence in such cases is to inform the conscience of the court, so that it can act intelligently and justly in the performance of a public duty. Whilst the act of deciding in such cases is quasi judicial, the difference between the granting and withholding of a license and the decision of a question between parties to a private litigation is manifest. Neither the petitioner nor any other person in this state has any property in the right to sell liquor."

The same kind of objection as in this case was made in King v. Bishop of London, 15 East, 117, where the respondent had refused to license a lecturer. Lord Ellenborough there said: "It has been urged, however (and much stress was laid upon it at the argument), that it was the duty of the bishop to have instituted his inquiry upon the subject, in the manner and by the means usually adopted in courts of law; that is, by the formal production of the charges made against the applicant in a judicial course, and by a public and solemn hearing of the several parties, their proofs and witnesses. But, in the first place, what power has the bishop to compel the attendance of parties and witnesses? What power has he to administer an oath, or what word is there in the act of Parliament that prescribes the mode by which he shall attain a conscientious satisfaction on the subject? It only requires him first to approve, that is before he licenses; and in so doing it virtually requires him to exercise his conscience, duly in-

formed, upon the subject, to do which he must duly, impartially, and effectually inquire, examine, deliberate, and decide."

The principle recognized in both of the cases referred to is that, inasmuch as the object of evidence in such examinations is merely to inform the conscience and judgment of the officer, such evidence may be taken in any way that is reasonably sufficient for that purpose. The officer is not governed by the rules of litigious evidence, and his decisions are not to be deemed arbitrary merely because they are founded upon information which a court would hold not to be evidence at all.

We not only adhere, then, to the opinion expressed in Manion's Case, 6 Mackey, 409, that the Commissioners have full discretion in the matter of retail liquor licenses, but we hold that they may conduct their inquiries by what may be called executive methods. * * *[5]

LILLIENFELD v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia, 1896. 92 Va. 818, 23 S. E. 882.)

Appeal from corporation court of Charlottesville.

Proceedings by the Commonwealth against T. J. Lillienfeld to revoke defendant's liquor license. From a judgment revoking the license, defendant appeals. Affirmed.

RIELY, J.[6] * * * The proceeding to revoke the license of the plaintiff in error to sell liquor was taken by the court of its own motion, under section 560 of the Code, which is as follows: "Upon the motion of the attorney for the commonwealth for the county or city, or of any other person, after ten days' notice to any person or firm licensed to sell liquors or any other thing, the granting of whose license was based upon the certificate of a court, the court which granted the certificate may revoke the license;" and the order of the court initiating the proceeding was in the following words: "It is ordered by the court that a notice be issued against F. J. Lillienfeld to show cause, if any he can, why the bar-room and retail-liquor license under which he is doing business should not be revoked for selling and causing to be sold to minors whisky, wine, and beer." Upon the hearing of the matter, Lillienfeld, by his counsel, moved the court to quash the notice upon the ground that it was not sufficiently specific, which motion the court overruled; and this constitutes the first assignment of error.

The order of the court, which was duly served upon the defendant, set forth plainly the ground of the proceeding—the sale of liquor to minors. It apprised him of the charge against his conduct of the business under his license. The statute does not provide, in terms,

[5] Compare Queen v. Licensing Justices, 14 Q. B. D. 584 (1885); Reg. v. Bartlett, 49 Justice of Peace, 712 (1885).

[6] Only a portion of the opinion by Riely, J., is printed.

that the ground upon which the revocation of the license is or will be asked shall be set forth in the notice or otherwise. It is sufficient to state the charge or charges in general terms, if stated with sufficient certainty to enable the person or firm whose license it is sought to revoke to understand the ground upon which the revocation will be asked. This was done in this case. The proceeding is a summary one; and, as was said by Judge Lewis in Cherry v. Com., 78 Va. 375, 378, "it was manifestly not the intention of the Legislature to require in such proceedings the application of the strict and technical rules which apply to indictments and other forms of accusation in criminal prosecutions." There is no substantial difference between the notice given in this case and the notice given in the case of Cherry v. Com., supra, or in the case of Davis v. Com., 75 Va. 944, in both of which cases the notice was held to be sufficient.

It is also alleged as error that the court admitted as evidence, over the objection of the defendant, 19 indictments which had been found against him by its grand jury for selling liquor to minors and were then pending in the court for trial; and also in receiving the testimony of Charles Wilkins that he had purchased intoxicating liquors of the defendant at his bar-room within the preceding 12 months, but prior to May 1, 1895, when his license took effect. In this there was no error. In a proceeding of this kind, the whole matter is heard and determined by the court, and it is not confined to the strict rules of evidence which obtain upon the trial of an issue before a jury, but the doors of evidence are and should be thrown open, that the court may be satisfied whether or not it has intrusted the sale of liquor to an unfit person, and the privilege of the license been abused or the law violated. The relevancy and materiality of the evidence, and the weight to be given to it, are matters for the consideration of the court, when it comes to determine the case. Even in certain criminal prosecutions involving the life or liberty of the accused, whenever the intent or guilty knowledge is a material ingredient in the issue of the case, evidence of other acts of the accused of a similar nature tending to establish such intent or knowledge is admissible as evidence, if not too far removed; and what are the limits as to the time and circumstances is for the court, in its discretion, to determine. Trogdon's Case, 31 Grat. 863.

Upon a review of the whole evidence, as certified by the court, we are of opinion that the discretion of the court was properly exercised in revoking the license of the plaintiff in error. When the license was granted, he, along with the other applicants for liquor license, was notified and warned by the court that if he sold or allowed liquor to be unlawfully sold to minors his license would be revoked. The evidence discloses that liquor was sold in his bar-room, in a number of instances, and, if he did not himself sell it, he did not exercise due oversight and vigilance to see that it was not done by his bar tender. It further appears that, even after the large batch of indict-

ments for selling liquor to minors had been found against him, he still retained as his bar tender the man who is proved to have freely and without inquiry sold liquor to minors. The protection of minors against the terrible evils which ensue from contracting in early life the habit of indulgence in strong drink, and the happiness of parents, as well as the good of society in general, require that this dangerous traffic in ardent spirits should be carefully guarded, and not placed or suffered to remain in the hands of men who will disregard the law, or allow it to be disregarded by their employés, or knowingly retain in their service as bar tenders persons who violate the law.

Upon a consideration of the whole case, the court is of opinion that the corporation court did not err in revoking the license of the plaintiff in error, and that its judgment should be affirmed.[7]

DODD et al. v. FRANCISCO et al.

(Supreme Court of New Jersey, 1902. 68 N. J. Law, 490, 53 Atl. 219.)

On certiorari.

DIXON, J. This certiorari brings before the court the proceedings of the state board of health respecting an application for permission to locate a cemetery in the town of Bloomfield, Essex county. The application was first presented on December 24, 1900, to the council of the town, and being approved by that body was then presented to the local board of health, which on March 5, 1901, refused to give its consent. Thereupon the applicants appealed to the state board of health, and on June 28, 1901, that board passed a resolution by which the action of the local authorities was reversed and the desired permission was granted. This resolution was set aside by this court at the term of February, 1902, because the parties interested had not been heard before the board itself; the only hearing given to them having been had before a committee of the board.

Afterwards, on April 22, 1902, the counsel of the respective parties were notified that on May 8, 1902, at 2 o'clock p. m., in the state house, the state board of health would meet to consider the application, and at that time and place counsel representing the applicants and the opponents appeared and were fully heard by the board, as were also all individuals who desired to express their views. The result of the board's deliberation was another resolution, passed May 22, 1902, to the same effect as that of June 28, 1901, which resolution is now before us for review.

[7] See, also, Traer v. State Board of Medical Examiners, 106 Iowa, 559, 76 N. W. 833 (1898). But see People ex rel. Silkens v. McGlyn, 62 Hun, 237, 16 N. Y. Supp. 736 (1891), no proof other than character and standing of complainants.

The statute under which these proceedings were taken is the sixth section of a supplement to the cemetery act, approved March 25, 1885. Gen. St. p. 354. * * *

The third, fifth and sixth reasons assigned for annulling the resolution present two questions—First, whether the board was bound to examine persons under oath touching the matters stated and controverted at the hearing before it; and, second, whether the board had a right to consider a report made to it by its committee while the first appeal was pending.

In the opinion delivered by Mr. Justice Garretson in the case above cited it is said: "The board of health was acting judicially upon the application before it, and all parties were entitled to be heard by the board in a legally organized meeting of the board." This expression is referred to by counsel for the prosecutors as indicating that it was the duty of the board to examine witnesses as to disputed questions of fact. But we do not so understand it. Its import is merely that the functions of the board were such as required the exercise of the judgment of the board itself, and hence that parties interested had a right to present and discuss before the board the matters on which its judgment should rest. Nor do we find either in the statute relating to cemeteries or in that establishing the state board of health (Gen. St. p. 1634), any indication that the board was to proceed as courts do in suits inter partes. There is nothing suggestive of a power to summon witnesses, to administer oaths or to compel the giving of evidence, either oral or written. Moreover, the matters to be considered by the board respecting the propriety of locating a new cemetery are of so general and public a nature that they can be decided more intelligently by observation and discussion than by testimony. In this respect the board resembles boards of assessment, whose proceedings involve the exercise of judicial functions (Peckham v. Newark, 43 N. J. Law, 576), but whose judgment is to be founded on facts obvious to their senses or ascertained by inquiry and examination, who, although not authorized to call witnesses and examine them upon oath, should, as do surveyors and freeholders in road cases, visit the premises in controversy and avail themselves of every accessible means of information likely to aid them in reaching a proper determination. State v. Jersey City, 24 N. J. Law, 662, 665.

We therefore conclude that the board was not bound to receive evidence under oath.

What has been already said indicates also that in our judgment it was not erroneous for the board to consider the report of its former committee regarding the matter pending before the board. The report was a means of information accessible not only to those who were members of the board when the report was presented, but also to new members. As a part of the discussion proper in the deliberations of such bodies, the report was at least the statement of persons

who had made special investigation and presumably formed impartial judgments on the matter under consideration. * * *[8]

Resolution granting the desired permission affirmed.

SECTION 25.—IN CONNECTION WITH REVENUE

TOMLINSON v. BOARD OF EQUALIZATION.

(Supreme Court of Tennessee, 1889. 88 Tenn. 1, 12 S. W. 414, 6 L. R. A. 207.)

LURTON, J.[9] * * * The complaint made in the petition is that it [the board of equalization] refused to hear witnesses offered by complainant in support of his complaint as to an excessive assessment as to valuation. In this, did they "exceed their jurisdiction," or "act illegally"? To determine this, we must not only consider the language of the act defining their duties, but consider the general nature and scope of the powers conferred upon them. They are styled a "board of equalization." They are charged, primarily, with the duty of "examining" and "equalizing" assessments. This duty they are expected, most manifestly, to perform, not upon testimony, but upon a "comparing" the assessments in one district or neighborhood with another—one piece of property with the assessment upon another of equal value. Clearly, this is to be done upon their own knowledge of the comparative valuations, and the end to be reached is an equalization whereby discriminations in favor of one, or against another, are to be corrected. In addition to this, they are to correct mistakes made by the assessor, and eliminate from the list property exempt under the law from assessment.

Finally, they are empowered to hear and adjust complaints from any party feeling aggrieved on account of excessive taxation, where in their judgment justice demands it. How are they to "hear and adjust" such complaints? Petitioner's contention is that they must hear witnesses produced by him; that he has a right to examine such witnesses, and cross-examine such as are produced against him. In other words, that the act contemplates a regular trial, according to the ordinary course of law, and the decision according to the weight of the proof. We have seen that, with reference to the primary duty of the board—that of equalizing assessments—the act contemplates no

[8] The rest of the opinion is omitted. See ante, p. 76.

[9] Only a portion of the opinion of Lurton, J., is printed.

issue of fact or hearing of evidence, but that the equalization is to be brought about by a comparison of assessments and the knowledge they have of the relative values of different pieces of property. Can the law contemplate any very different method of correcting an excessive assessment? The knowledge of relative values—of comparative values—which they have as citizens and freeholders, and which they obtain from an examination and comparison of the assessment lists, will, in the vast majority of cases, enable them to act justly upon the complaint. But cases may occur where these means are, in their judgment, unsatisfactory. In such case, the act declares that the "board shall have the right to summon before them witnesses, who shall be disinterested freeholders; and the sworn testimony of three such witnesses concerning same will be sufficient evidence upon which such board may act." The "board shall have the right" to summon before them disinterested freeholders is the language of the act. Does this power conferred make it their duty to either have witnesses brought by the party making complaint, or require them in all cases to summon witnesses upon such complaint being made; or is the hearing of witnesses a matter wholly in their discretion? We think the statute means no more than it plainly discloses.

To hold that it was the duty to permit the examination of witnesses offered by a complainant would imply a duty to the state and county to hear and examine witnesses to sustain the assessment. All this would imply a trial, and a judgment upon weight of proof. The question of valuation is altogether a matter of opinion. Before questions of opinion the greatest diversity may be expected. The sessions of this board terminate in two weeks; and at the end of that time they are required to return the assessment lists, and their corrections, to the clerk of the county court. In populous counties the assessments reach into the thousands. That each taxpayer should have the right to come with his witnesses, and have them heard, and be heard by counsel, would result in such delay and embarrassment as to amount to a great public peril with regard to the assessment of the public revenues. No legislative body could have seriously contemplated such a tribunal to determine a mere question of an excessive valuation for purpose of assessment. Occasional instances of excessive assessments may occur; but they had better be borne than that such a court should be created to settle them. The taxpayer in the first instance may make his representations to the assessor. If he overassess him, he may carry the matter to a board of disinterested freeholders, acting under oath. If they upon their own knowledge, agree with the assessor, and, upon a "comparison," find no case for a reduction of or purpose of equalization, the chances are that the assessment is not far wrong. If he cannot induce the board to think that it is a case where they ought, for their own enlightenment, exercise the power they have to summon witnesses of their own selection, he must submit.

The board was not "exceeding its jurisdiction," or "acting illegally," in refusing to have the witnesses offered by petitioner; and it had a right to refuse to summon witnesses of its own selection, if it deemed that justice did not demand evidence from witnesses. * * *[10]

AUFFMORDT v. HEDDEN.

(Supreme Court of United States, 1890. 137 U. S. 310, 11 Sup. Ct. 103, 34 L. Ed. 674.)

In Error to the Circuit Court of the United States for the Southern District of New York.

Action to recover an alleged excess of duties, paid under protest.

BLATCHFORD, J.[11] * * * Section 2930 of the Revised Statutes, under which the principal question in the case arose, was as follows: "If the importer, owner, agent, or consignee of any merchandise shall be dissatisfied with the appraisement, and shall have complied with the foregoing requisitions, he may forthwith give notice to the collector, in writing, of such dissatisfaction, on the receipt of which the collector shall select one discreet and experienced merchant to be associated with one of the general appraisers wherever practicable, or two discreet and experienced merchants, citizens of the United States, familiar with the character and value of the goods in question, to examine and appraise the same,

[10] Compare Ekiu v. United States, 142 U. S. 651, 663, 12 Sup. Ct. 336, 35 L. Ed. 1146 (1892).

Under statutory provisions, assessing board may be required to hear witnesses. People ex rel. Bronx Gas & Electric Co. v. Feitner, 43 App. Div. 198, 59 N. Y. Supp. 327 (1899); People ex rel. Manhattan Co. v. Barker, 152 N. Y. 417, 46 N. E. 875 (1897).

As to the former practice of accepting the tax-payer's oath as conclusive upon the amount of his assessment, see People ex rel. Buffalo, etc., Co. v. Barker, 48 N. Y. 70, 74–77; Inhabitants of Newburyport v. County Commissioners, 12 Metc. (Mass.) 211.

The same practice is commonly followed with regard to the qualifications of electors, so far as the action of election or registration officers is concerned. "Practically, the law leaves it to the conscience of the person offering to vote to decide whether he can or will do so when his right is challenged. The inspectors cannot do more than to make use of the machinery provided by the law to test the voter's legal qualifications, and they cannot decide upon the truth or falsity of the answers to their questions. The law provides for the punishment of a person who falsely personates a registered voter; and the proposed elector, who is challenged for that cause, if he persists in his attempt to vote, may accomplish his purpose, but at the peril consequent upon false swearing and of false personation. If, with all the safeguards with which popular elections are legally and naturally surrounded, frauds are perpetrated, the tribunals are open, and laws and a system of procedure exist for the punishment of the offenders, and for the rectification of consequent errors, in behalf of an individual whose legal rights are affected; and legislative bodies are judges as to the qualifications, returns, and elections of their members." People ex rel. Stapleton v. Bell, 119 N. Y. 175, 23 N. E. 533 (1890); Gillespie v. Palmer, 20 Wis. 544 (1866), post, p. 302.

[11] Only a portion of the opinion of Blatchford, J., is printed.

agreeably to the foregoing provisions, and, if they shall disagree, the collector shall decide between them; and the appraisement thus determined shall be final, and be deemed to be the true value, and the duties shall be levied thereon accordingly." [At the trial, the plaintiffs put in evidence a number of regulations of the Treasury Department, among them the following: "Act. 474. Merchants' appraisements should not assume the nature of a judicial inquiry where judgment is rendered in accordance with the preponderance of testimony on either side, but should be conducted as an investigation of experts, to ascertain whether the local appraiser has reported the true and proper market value of the merchandise in question."] * * *

They also offered in evidence sundry depositions of witnesses taken before the reappraisers in this case, in regard to market value, but they were excluded by the court on the objection of the defendant, and the plaintiffs excepted. They also offered to show by a witness the true and actual market value and wholesale price of the goods in question, and of goods identical with them, in the principal markets of the country from which they were exported, at the time of their exportation, in March, 1886; but, on the objection of the defendant that the testimony was immaterial, incompetent, and irrelevant, it was excluded, and the plaintiffs excepted. * * * They also requested the court to submit all of the evidence to the jury touching the value upon which the duty was assessed, and the value declared on entry, on the ground that section 2930 of the Revised Statutes was unconstitutional; that the plaintiffs had the right to have submitted to the jury, under proper instructions, on the evidence, all questions touching the imposition of duty; and that, by withholding the evidence from the jury, by virtue of an unconstitutional statute which declared the conclusions of the reappraisers to be final, the plaintiffs were deprived of their constitutional right to a trial by jury, in a case where, by the common law, it obtained, under article 7 of the amendments of the Constitution. This request was denied, and the plaintiffs excepted.

It is provided, by section 2902 of the Revised Statutes, that it shall be the duty of the appraisers of the United States, "and every person who shall act as such appraiser," "by all reasonable ways and means in his or their power, to ascertain, estimate, and appraise the true and actual market value and wholesale price" of the merchandise under appraisal, "at the time of exportation, and in the principal markets of the country whence the same has been imported into the United States"; and, by section 2930, it is made the duty of the general appraiser and the merchant appraiser to examine and appraise the goods "agreeably to the foregoing provisions." * * *

The views of the Circuit Court in regard to this case, as stated at the trial, are set forth in the report of it in 30 Fed. 360, and are contained also in the record. Mr. Robinson, the agent of the plaintiffs, employed to attend to their custom-house business, and who acted in

the present case, gave his testimony as to what took place in regard to the reappraisement, so far as he was cognizant of it. The court commented on his testimony and that of other witnesses, and said: "I do not gather from the testimony, as given here, that the plaintiffs or their agent understood that they were in any way excluded from their goods, which were in the adjoining room. I understand him to say that when his appraisal was going on he was at perfect liberty to be in the room where the goods were, and point them out to the appraisers, but not to the witnesses. I understand him that there was a notice on the door that led into that room that nobody would be allowed in there when the witnesses were examining the goods. When this case was up and the merchant appraiser and the general appraiser were there, if he had wanted to, he could have gone into the room, and pointed out any of the goods he had a mind to. He was asked to make his statement, and understood that he had the right. He didn't question but that the samples they had were the right ones. He stayed there as long as he wanted to, to do anything about pointing out his goods. I think the importer was entitled to that—to be there when the appraisal was made; to point out his goods; to know they were his goods; to illustrate them, and exhibit them in any manner he saw fit; and to present to the appraisers any views he had. I think he had that right; but I am not able to say from this evidence that there was anything tending to show that he was denied that right. There is one other point upon which I am not clear; that is when this board takes testimony (and, whether they will take it all or not, they are to decide themselves), whether they are bound to let the importer know that they are taking it; or, if they do let the importer know they have taken it, whether they are bound to let him know what it is, so he may answer it. But my impression is that that is discretionary with the board; that they may make inquiry by what they deem to be proper ways and means; and that the importer must rely on their fairness and judgment as to what testimony they do take, and the weight they give to it; that the fact that the importer was not informed who the witnesses were, and what they testified to, and given an opportunity to cross-examine them, and an opportunity to meet it, does not constitute a valid objection against the reappraisement."

The contention of the plaintiffs is that under the instructions of the treasury department, and the evidence, the question in issue as to the dutiable value of the merchandise could not be reasonably heard at all, on the reappraisement, because (1) the importer or his agent was practically excluded from the reappraisement; (2) was not afforded opportunity to support his oath on entry, or within proper limits to confront the opposing witnesses by testimony in his own behalf; (3) or to sift evidence secretly or openly heard in opposition to him; (4) or to have the aid of counsel, if he desired; and, particularly, that the rule of "reasonable ways and means" could not exist in a

tribunal which proceeded to examine an issuable matter under a rule which excluded lawyers.

We are of opinion that, under the statute, the question of the dutiable value of the merchandise is not to be tried before the appraisers as if it were an issue in a suit in a judicial tribunal. Such is not the intention of the statute, and the practice has been to the contrary from the earliest history of the government. No government could collect its revenues or perform its necessary functions, if the system contended for by the plaintiffs were to prevail. The regulations prescribed in the instructions from the Treasury Department are reasonable and proper. By section 2949 of the Revised Statutes (U. S. (Comp. St. 1901, p. 1940) the Secretary of the Treasury has power to establish "rules and regulations not inconsistent with the laws of the United States, to secure a just, faithful, and impartial appraisement of all merchandise imported into the United States"; and by section 2652 (page 1821) it is made "the duty of all officers of the customs to execute and carry into effect all instructions of the Secretary of the Treasury relative to the execution of the revenue laws; and, in case any difficulty shall arise as to the true construction or meaning of any part of the revenue laws, the decision of the Secretary of the Treasury" is made conclusive and binding. The proceedings for appraisal must necessarily be to some extent of a summary character. * * *

Although by section 29 of the act of June 10, 1890, c. 407, entitled "An act to simplify the laws in relation to the collection of the revenues," sections 2902 and 2930 of the Revised Statutes are expressly repealed, section 10 of that act provides that it shall be the duty of the appraisers of the United States, "by all reasonable ways and means," to appraise the actual market value and wholesale price of imported goods in the principal markets of the country whence the same have been imported; and section 13 of that act provides that the decision of the appraiser or that of the general appraiser in cases of reappraisement, or that of the board of general appraisers on review, shall be final and conclusive as to the dutiable value of the merchandise, against all parties interested therein. There is nothing in the instructions of the Secretary of the Treasury, or in any of the regulations prescribed, or in the evidence in this case, which shows that the appraisers were not free to perform their duties properly, as required by the statute. The reappraisers appraised the goods in the appraisers' room in the public store. On the day before the reappraisement took place, the agent of the plaintiffs received due notice of it, and he attended and was called by the reappraisers before them. The merchant appraiser had then and there samples of the plaintiffs' goods, and the general appraiser asked the agent for his statement in the case, and it was made. The samples were on the table before the merchant appraiser, and the cases of goods were in the adjoining room. The agent made no objection as to the proceedings, and tes-

tifies that he was allowed to make a full statement concerning the value of the plaintiffs' goods; and the evidence fails to show that any request was made on behalf of the plaintiffs which was refused, except the request to find the value which the plaintiffs desired to be found. * * *[12]

ORIGET v. HEDDEN.

(Supreme Court of United States, 1894. 155 U. S. 228, 15 Sup. Ct. 92, 39 L. Ed. 130.)

FULLER, C. J.[13] * * * 3. The contention that the importer has the right to be present throughout the proceedings on the reappraisement, hear or examine all the testimony, and cross-examine the witnesses, which was passed on in Auffmordt v. Hedden, 137 U. S. 310, 11 Sup. Ct. 103, 34 L. Ed. 674, is renewed in this case.

The importer appeared at the opening of the reappraisal, and made application that he or his associate or his counsel might examine the various affidavits made by experts, importers, merchants, and others, be present at the taking of any testimony, and cross-examine all witnesses produced, or suggest questions to the general appraiser. The appraisers ruled that they could not accede to this request, but expressed their desire to hear the importers in regard to their reappraisements, and their assurance of appreciation of any suggestions the importers might make as to asking questions of the witnesses. The presumption in favor of official action sustains this ruling as being in accordance with the rules and regulations established by the Secretary of the Treasury, under section 2949 of the Revised Statutes (U. S. Comp. St. 1901, p. 1940), to secure a just, faithful, and impartial appraisal of all merchandise imported into the United States, and just and proper entries of the actual market value or wholesale price thereof; and this was indeed the fact, as appears by reference to the general regulations of 1884, and instructions of June 9, 1885, given at length in Auffmordt v. Hedden.

The following quotation from the instructions of 1885 will suffice to explain the reasons for the rule: "The law provides that the merchant appraiser shall be familiar with the character and value of the goods in question, and it is presumed that the general appraiser will have or will acquire such expert knowledge of the goods he is to appraise as to enable him to intelligently perform his official duty with a due regard for the rights of all parties and independently of the testimony of interested witnesses. The functions of the reappraising board are the same as those of the original appraisers. They are themselves to appraise the goods, and not to depend for their information upon the appraisement of so-called experts in the line of goods

[12] See rules regarding examination of immigrants, 125 Fed. 643.

[13] Only a portion of the opinion of Fuller, C. J., is printed.

in question. * * * Appraisers are authorized to summon witnesses, but there is no authority for the public examination of such witnesses or their cross-examination by importers or counsel employed by such importers. The appraising officers are entitled to all information obtainable concerning the foreign market value of goods under consideration, but such information is not public property. It is due to merchants and others called to give such information that their statements shall be taken in the presence of official persons only. It must often occur that persons in possession of facts which would be of value to the appraisers in determining market values are deterred from appearing or testifying by the publicity given to reappraisement proceedings."

As already stated, plaintiff in the case at bar was invited by the appraisers to present his views in regard to the reappraisement, and to suggest questions to be put to the witnesses. He did not avail himself of the opportunity, but insisted on the right to remain throughout the proceedings, to be informed as to all the evidence, and to cross-examine the witnesses as in open court. This, according to Auffmordt v. Hedden and Passavant v. U. S., 148 U. S. 214, 13 Sup. Ct. 572, 37 L. Ed. 426, could not be conceded. In those cases it was ruled that under the revenue system of the United States the question of the dutiable value of imported articles is not to be tried before the appraisers, as if it were an issue in a suit in a judicial proceeding; that such is not the intention of the statutes; that the practice has been to the contrary from the earliest history of the government; and that the provisions of the statute in this behalf are open to no constitutional objection.

As respects taxation and assessment for local improvements, such notice and hearing as are appropriate to the nature of the case, and afford the opportunity to assert objections to the methods pursued or to the amount charged, are deemed sufficient for the protection of the individual. Lent v. Tillson, 140 U. S. 316, 327, 11 Sup. Ct. 825, 35 L. Ed. 419.

Duties imposed under tariff laws are paid in order that goods may be brought into the country, and provisions in respect of their levy and collection are framed in view of the character of the transaction. The finality of the appraisal is a condition attending the importation prescribed by the government as essential to the operation of the system; and, if the importer is afforded such notice and hearing as enables him to give his views and make his contention in respect of the value of his goods, he cannot complain. * * *

Judgment affirmed.

SECTION 26.—IN DEALING WITH NUISANCES

REYNOLDS v. SCHULTZ.

(Superior Court of City of New York, 1867. 27 N. Y. Super. Ct. 282.)

ROBERTSON, C. J.[14] * * * The statute[15] requires the execution of the order to be suspended on demand of the party notified, and a hearing to be given him upon a fair and reasonable opportunity therefor, when he is to be allowed to give such proofs as he has to offer, and the board may also introduce new proofs. Upon such hearing they may modify or rescind such order in an action at law. The board were then required to "cause the facts in regard to such complaint to be investigated and the appropriate remedy applied." This resembles greatly the trial and decision of issues in an action. If private individuals failed to call to their notice peccant employments, premises or substances, such board had a staff of accusers, consisting of ten medical inspectors, to report twice a week on such facts as had come to their knowledge relative to the purposes of such act. So that abundant means were provided for obtaining the sufficient proof which the board were to take, without leaving their office, or uttering a word themselves, of accusation. I cannot come to any other conclusion than that such a mode of accusation, or obtaining evidence in advance, with such opportunity of being heard with evidence, and such a mode of final determination, was an exercise of judicial powers, and binding, unless prevented by some positive constitutional prohibition. If the compulsory attendance of witnesses for the accused, if necessary, be required to make the proceedings judicial, the board would probably be bound to give him the aid of the power they possess under the twenty-fourth section of the statute, to procure testimony. But in this case there is no pretense that any testimony has been lost by that means. If it had been set up, possibly this court might have exercised an equitable jurisdiction in obtaining such testimony, and perhaps also have thereby acquired jurisdiction over the whole subject. In order to enable such board to obtain proof sufficient for them to act upon, there was no necessity of their becoming active in hunting up testimony. The twenty-first section of the act requires them to keep a book open for public inspection, in which complaints of a sanitary character are to be recorded, signed by the accuser with his name, in which is to be entered the name of the accused, the date and the remedy suggested. This is not very unlike a complaint. * * *

[14] Only a portion of the opinion of Robertson, C. J., is printed.

[15] For provisions of statute in question, Laws N. Y. 1866, c. 74, see Metropolitan Board of Health v. Heister, ante, p. 137.

The main objections to the constitutionality of the exercise of power under such first subdivision are that such proceedings violate "the laws of the land" required to be observed by the second section of the article of the Constitution of this state, and are not "due process of law" under the sixth section of the same article. The special points in which they are supposed to deviate therefrom are six in number, as follows:

(1) That the functions of accuser and judge are blended in the same body.

(2) That no process is served, or notice of the proceedings given to parties interested.

(3) That the judgment precedes the trial.

(4) That the accused is not confronted with witnesses against him.

(5) That the testimony is not under oath, nor the ordinary rules of evidence observed.

(6) That no means are afforded to the accused to compel the attendance of witnesses.

The remarks already made dispose of the first and last of these objections. Indeed, I am not aware that there is any warrant for assuming that there must be a public prosecutor, except in cases in which the Constitution requires the presentment of a grand jury in order to make a conviction legal. Prosecuting officers are the creatures of statutes, and, however expedient, are not indispensably necessary to procure the punishment of offenders. The people of the state are the accusers and "actors" in all cases of public offenses.

The second and third of such objections are inapplicable to the case of an order, made absolute by the default of a party notified to move to set it aside after notice, or confirmed after a hearing upon evidence on both sides. Indeed, they are founded upon the mistaken notion that the first order is the final adjudication, instead of being a conditional order, made absolute only after a hearing, or neglect to appear after notice and demand of such hearing. The seizure of chattels in an action of claim and delivery, or the issuing of a preliminary injunction order, attachment or order of arrest, would be equally subject to such an objection.

As to being confronted with witnesses, if that applies to the hearing, the board are bound to allow it, if their proceeding would otherwise be unconstitutional, and any irregularity in that respect could be corrected on certiorari. If oaths are necessary to be administered to witnesses, the same rule would prevail.[16] Although I am not prepared to say that an adjuration of a witness, the form of which may be varied by law, and is allowed according to the conscience of the party

[16] Groenvelt v. Burwell, 1 Ld. Raym. 454, 472 (1699): "And by Holt, Chief Justice, where judicial power is given to persons by statute, they may by consequence of law administer an oath; but to that, he said, he would not give a positive opinion."

sworn, including the simple affirmation of a member of the Society of Friends, is a constitutional requisition to make a trial valid.

In regard to the attendance of witnesses, what I have already said as to that cause of complaint will suffice. And I am inclined to think that it will be found, on examination, that a power to compel the attendance of witnesses for the accused will not be found to be part of "the law of the land," at least that mentioned in "Magna Charta," and was given in more recent times.

There still remains an objection to be considered, to wit, that no trial by jury is allowed under such statute. The words of the Constitution upon that point are (article 1, § 2) that "the trial by jury in all cases, in which it has been heretofore used, shall remain inviolate forever." The term "case," in such provision, has been held to mean the kind of action, prosecution or proceeding, and is not confined to the subject-matter. Thus, in the case of Duffy v. People, 6 Hill, 75, it was held that a proceeding to compel a husband to support his wife, being a mere preventive proceeding, like giving security to keep the peace, did not require a trial by jury, and that, preventive remedies for similar offenses having been used before the adoption of the Constitution, obtaining them was not a "case" within the meaning of the Constitution in which trials by jury had been used, although it was held that the adjudication of the magistrate on the subject of the marriage of the parties, although sufficient to compel giving security, was not conclusive. But although the judgment for the abatement of a nuisance at common law, "quod permittat prosternere," may have required a trial by jury, when demanded, yet courts of equity could always restrain the conducting of any business which was one, without such jury. And that is all which the order, as finally modified in this case, does. Such objection, therefore, falls to the ground. * * *

HUTTON v. CITY OF CAMDEN.

(Court of Errors and Appeals of New Jersey, 1876. 39 N. J. Law, 122, 23 Am. Rep. 203.)

BEASLEY, C. J.[17] * * * But to rest here would be to put this matter on too narrow a ground. There is an infirmity in all proceedings of this nature, which lies deeper than the one just noticed. Assuming the power in this board, derived from the Legislature, to adjudge the fact of the existence of a nuisance, and also assuming such jurisdiction to have been regularly exercised, and upon notice to the parties interested, still, I think, it is obvious that, in a case such as that before this court, the finding of the sanitary board cannot operate in any respect, as a judgment at law would, upon the rights involved. It will require but little reflection to satisfy any mind, accustomed to

[17] For first part of opinion, see ante, p. 136.

judge by legal standards, of the truth of this remark. To fully estimate the character and extent of the power claimed will conduct us to its instant rejection. The authority to decide when a nuisance exists is an authority to find facts, to estimate their force, and to apply rules of law to the case thus made. This is a judicial function, and it is a function applicable to a numerous class of important interests. The use of land and buildings, the enjoyment of water rights, the practice of many trades and occupations, and the business of manufacturing in particular localities, all fall, on some occasions, in important respects, within its sphere. To say to a man that he shall not use his property as he pleases, under certain conditions, is to deprive him, pro tanto, of the enjoyment of such property. To find conclusively against him that a state of facts exists with respect to the use of his property, or the pursuit of his business, which subjects him to the condemnation of the law, is to affect his rights in a vital point.

The next thing to depriving a man of his property is to circumscribe him in its use, and the right to use property is as much under the protection of the law as the property itself, in any other aspect, is; and the one interest can no more be taken out of the hands of the ordinary tribunals than the other can. If a man's property cannot be taken away from him except upon trial by jury, or by the exercise of the right of eminent domain upon compensation made, neither can he, in any other mode, be limited in the use of it. The right to abate public nuisances, whether we regard it as existing in the municipalities, or in the community, or in the land of the individual, is a common-law right, and is derived, in every instance of its exercise, from the same source—that of necessity. It is akin to the right of destroying property for the public safety, in case of the prevalence of a devastating fire or other controlling exigency. But the necessity must be present to justify the exercise of the right, and whether present or not must be submitted to a jury under the guidance of a court. The finding of a sanitary committee, or of a municipal council, or of any other body of a similar kind, can have no effect whatever, for any purpose, upon the ultimate disposition of a matter of this kind. It cannot be used as evidence in any legal proceeding, for the end of establishing, finally, the fact of nuisance, and if it can be made testimony for any purpose it would seem that it can be such only to show that the persons acting in pursuance of it were devoid of that malicious spirit which sometimes aggravates a trespass, and swells the damages.

I repeat that the question of nuisance can conclusively be decided, for all legal uses, by the established courts of law or equity alone, and that the resolutions of officers, or of boards organized by force of municipal charters, cannot, to any degree, control such decision. * * *[18]

[18] **Accord:** Munn v. Corbin, 8 Colo. App. 113, 44 Pac. 783 (1896).

SECTION 27.—IN REMOVING FROM OFFICE

STATE ex rel. MEADER v. SULLIVAN.

(Supreme Court of Ohio, 1898. 58 Ohio St. 504, 51 N. E. 48, 65 Am. St. Rep. 781.)

SPEAR, C. J.[19] Two questions are presented. One relates to the sufficiency of the charges; the other, to the action of the mayor upon them. [The decision upon the first question is here omitted. See ante, p. 188.]

Upon the other branch of the case it will be noted that the answer avers that at the trial "not a word of evidence tending to sustain the truth of the facts alleged in said charges, or either of them, was adduced or heard by said mayor, and that no statement or information of any personal or official knowledge of the mayor, of any kind, tending to substantiate or prove the facts alleged in said charges, or either of them, was made or communicated to this defendant." It will be further noted that in his order the mayor recites that, "I find from the evidence, and also from the facts within my personal knowledge," etc. As stated elsewhere, the power given the mayor is not judicial within the meaning of the Constitution, yet, as already found, it is not to be exercised arbitrarily; that is, a hearing is to be given the accused, and he is to have the opportunity to refute what is adduced against him. So that it would not be a proper exercise of power for the mayor to determine the truth of a charge on his own personal knowledge without making that publicly known, and offering the opportunity above alluded to. If the averment that not a word of evidence tending to sustain the truth of the facts alleged was adduced or heard by the mayor, etc., is to be taken as an averment that no testimony at all was heard, but that the mayor's finding rested entirely on facts within his personal knowledge, uncommunicated—and it is insisted by counsel for defendant in error that such is its meaning—then clearly, upon this ground, also, should the mayor's order be held invalid.

The majority of the court, at least, inclines to regard the legal effect of the averment as a conclusion of law merely; that is, that in the opinion of the pleader the evidence did not tend to sustain the truth of the charges, and that whatever statement the mayor may have made upon personal knowledge did not tend to substantiate the facts alleged.

[19] For statement of case, see ante, p. 188.

The decision therefore is rested upon the first proposition. Judgment affirmed.[20]

MINSHALL, J., dissents.

PEOPLE ex rel. McALEER v. FRENCH et al.

(Court of Appeals of New York, 1890. 119 N. Y. 502, 23 N. E. 1061.)

Appeal from Supreme Court, General Term, First Department.

The police commissioners of New York city dismissed the relator from the police force for intoxication. On certiorari that order was affirmed by the Supreme Court, General Term, and relator appeals.

EARL, J.[21] The members of the police force of the city of New York have a permanent tenure of office; and they cannot be dismissed from the force, for any fault or misconduct, until after charges have been preferred against them, and such charges have been examined, heard, and investigated as provided in the statutes, and the rules adopted by the board of police commissioners. The following is one of the rules adopted by that board: "Any member of the police force may be punished by the board of police, in their discretion, either by reprimand, forfeiture, and withholding pay, not exceeding thirty days for any one offense, or by dismissal from the force on conviction of either of the following offenses, to wit." Among the offenses specified are intoxication, neglect of duty, and conduct unbecoming an officer. We are dealing in this case with the offense of intoxication, as that was the charge made against the relator. * * * Taking the case as it appears to us, it was certainly a very severe punishment to dismiss the relator from the police force, where he had so long and faithfully served. But the extent of the punishment rested entirely in the discretion of the commissioners, and neither the Supreme Court nor this court has any jurisdiction to interfere therewith.

We think the force and effect of the decision in the Masterson Case[22] has been somewhat misapprehended. In determining the guilt of a police officer who is on trial for charges preferred against him, the police commissioners cannot act upon their own knowledge. The charges must be tried upon evidence, and the guilt must be established by evidence produced before the commissioners upon the

[20] "The law contemplates that the members of the board will act upon proof of some sort appropriate to the case and made a matter of record; not necessarily that they will in all cases act regardless of personal investigation, but that in case of reliance thereon the result of the investigation will be made matter of record." State ex rel. Medical College v. Chittenden, 127 Wis. 468, 517, 107 N. W. 500 (1906).

[21] Only a portion of the opinion of Earl, J., is printed.

[22] People ex rel. Masterson v. French, 110 N. Y. 494, 18 N. E. 133 (1888). See, also, People v. Glennon, 37 Misc. Rep. 1, 74 N. Y. Supp. 794 (1902).

trial. They can neither act upon their own knowledge, nor supplement the evidence by their own knowledge. But, in inflicting the punishment, they may take into consideration the evidence, as well as their own knowledge of the police officer, and inflict such punishment, authorized by the rules and the statutes, as, in their judgment, the case, in view of all the circumstances, requires. We did not determine in that case that the Supreme Court, upon certiorari, did not have jurisdiction to review the determination of the police commissioners upon the evidence; and it is a mistake to suppose that, if there is any evidence in the record brought to the Supreme Court by certiorari sustaining the determination of the commissioners, that court has no right to interfere therewith. Such is the rule in this court, and such was the rule at common law.

But now, by section 2140 of the Code of Civil Procedure, upon the hearing on the return of a writ of certiorari the Supreme Court may inquire whether there was any competent proof of all the facts necessary to prove in order to authorize the making of the determination, and, if there was such proof, whether there was, "upon all the evidence, such a preponderance of proof against the existence of any of those facts that the verdict of a jury affirming the existence thereof, rendered in an action in the Supreme Court triable by a jury, would be set aside by the court as against the weight of evidence." Therefore, in all this class of cases, it is the duty of the Supreme Court, not only to inquire whether there is any competent proof tending to establish the guilt of the accused officer, but it must look into the evidence; and, if it finds that there is a preponderance of evidence against the determination of the commissioners, then it has the same jurisdiction to reverse the determination that it has to set aside the verdict of a jury as against the weight of evidence. It is the purpose of the law to give a review in the Supreme Court by certiorari, not only upon the law, but upon the evidence, to the extent specified in the statute; and every party who seeks such a review is entitled to the fair and judicious exercise of that jurisdiction.

We do not perceive that the relator's right to call witnesses, and have them sworn in his behalf, upon his trial, was denied or curtailed by the police commissioner who took the evidence. We are therefore constrained to affirm the order; but, under the circumstances, it must be without costs.

SECTION 28.—POWER TO OBTAIN INFORMATION [23]

LANGENBERG v. DECKER.

(Supreme Court of Indiana, 1892. 131 Ind. 471, 31 N. E. 190, 16 L. R. A. 108.)

Appeal from superior court, Marion county.

Proceedings in habeas corpus by Philip Decker against Henry W. Langenberg, Sheriff of Marion County. From a judgment discharging plaintiff from custody defendant appeals. Affirmed.

COFFEY, J.[24] The General Assembly of the state passed an act, which was approved and went into force on the 6th day of March, 1891, entitled "An act concerning taxation, repealing all laws in conflict herewith, and declaring an emergency." The act creates a state board of tax commissioners, composed of five persons, viz., the Secretary of State, the Auditor of State, and the Governor of the state, who are styled ex officio members, and two persons of opposite political faith, appointed by the Governor of the state. * * * It also contains this provision: "They shall have the power to send for persons, books, and papers, to examine records, hear and question witnesses, to punish for contempt any one who refuses to appear and answer questions by fine not exceeding one thousand dollars, and by imprisonment in the county jail of any county not exceeding thirty days, or both. Appeals shall lie to the criminal court of Marion county from all orders of the board inflicting such punishment, which ap-

[23] The power to require an oath (to be administered by some official authorized to administer oaths) may be implied from usage. United States v. Bailey, 9 Pet. 238, 9 L. Ed. 113 (1835). See, also, Caha v. United States, 152 U. S. 211, 14 Sup. Ct. 513, 38 L. Ed. 415 (1894).

Power to require production of papers, etc. Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746 (1886); State v. Davis, 108 Mo. 666, 18 S. W. 894, 32 Am. St. Rep. 640 (1892); St. Joseph v. Levin, 128 Mo. 558, 31 S. W. 101, 49 Am. St. Rep. 577 (1895).

As to powers of inquisition, see Commissioners of Enquiry, 12 Coke, 31; article on the Corporation Commission, 11 Law Magazine 68; University Commission, 15 Law Magazine (N. S.) 79.

Power to require information or reports, tending to incriminate. Com. v. Emery, 107 Mass. 172, 9 Am. Rep. 22 (1871); Counselman v. Hitchcock, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110 (1892); Brown v. Walker, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819 (1896); People ex rel. Lewisohn v. O'Brien, 176 N. Y. 253, 68 N. E. 353 (1903), overruling People v. Kelly, 24 N. Y. 74 (1861); People v. Butler Street Foundry Co., 201 Ill. 236, 66 N. E. 349 (1903); Hale v. Henkel, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652 (1906).

For general administrative power to obtain information (not to be found in English or American law), see General Administrative Act of Prussia of July 30, 1883, § 119: "The administrative authorities have power, even in other cases than those expressly designated by law, to summon parties in interest or their authorized representatives to an oral hearing for the purpose of ascertaining facts."

[24] Only a portion of the opinion by Coffey, J., is printed.

peals shall be governed by the laws providing for appeals in criminal cases from justices of the peace, so far as applicable. The sheriffs of the several counties of the state shall serve all process and execute all orders of the board."

Claiming to act under the power and authority conferred upon it by the provisions of the statute, the state board of tax commissioners, on its own motion, caused a subpœna duces tecum to be issued to all the banks in the state, requiring the president, cashier, and bookkeeper, or either of them, of the bank named in the subpœna, to appear before the board at the office of the state board of tax commissioners in the state house in the city of Indianapolis, on a day named in the subpœna, and to bring and have with them then and there such books, papers, and accounts of such banking institution as should fully disclose and show the names of all persons having money, bonds, stocks, notes, or other property of value on deposit and in the custody of such bank on the 1st day of April, 1891, and the respective amounts of such deposits or other property in the custody of the bank, and to answer all questions which might be asked in relation thereto or with reference to the property owned by the bank itself. * * *

One of the subpœnas was served upon the appellee at the city of Evansville, where he resides, and where he is vice president of a state bank known as the German Bank of Evansville. In answer to the subpœna he appeared before the state board of tax commissioners on the 25th day of August, 1891, when there were present of the members of the board the following persons, and others, viz., Claude Matthews, Secretary of State, acting as president of the board, J. O. Henderson, Auditor of State, and Ivan N. Walker.

Upon his appearance he was duly sworn, when the following proceedings were had, viz.: "Question. State your name and place of residence. Answer. Philip C. Decker. I reside in the city of Evansville. Q. In what business are you engaged? A. That of banking. Q. With what institution are you engaged, and in what capacity? A. I am vice president of the German Bank of Evansville, Indiana. The president lately died, and I am acting as president. Our bank was organized under the laws of Indiana. Q. State the aggregate amount of the individual deposits held by the German Bank, of which you are vice president, on the 1st day of April, 1891. A. About $300,000. Q. Give the amount of money held on deposit by said bank on the 1st day of April, 1891, belonging to some one depositor. The Witness: Before answering the question, I respectfully ask the board whether there is any appeal, complaint, suit, or proceeding of any kind pending before this board or elsewhere to assess any depositor, or to revise his tax list in any manner. By the Board: No. We are exercising the power of discovery. The Witness: I decline to answer, under the advice of counsel, either as to the name of any depositor or the amount of his deposit. * * *"[25]

[25] A number of similar questions and answers followed, which are omitted.

Thereupon the state board of tax commissioners, because of the refusal of the appellee to appear and answer the questions above set forth, and to give the information thereby sought to be elicited, assessed against him a fine of $500, and that he stand committed until the fine be paid or replevied, and entered the following judgment: "Therefore it is considered and ordered by the state board of tax commissioners that Philip C. Decker, on account of his refusal to appear and answer questions, and his disobedience to the order of this board, be, and hereby is, fined in the sum of five hundred dollars ($500); and it is further considered by the board that said Philip C. Decker do stand committed to the jail of Marion county, Indiana, until said fine be paid or replevied."

Upon entering the foregoing judgment, the secretary of the board delivered to the appellant, as the sheriff of Marion county, a commitment reciting the fact that the appellee had been fined the sum of $500 for contempt, and ordering that he be committed to the jail of Marion county until discharged by due process of law. Upon this commitment the appellee was arrested. He thereupon filed his petition in the Marion superior court, praying for a writ of habeas corpus. To the writ issued upon this petition the appellant made his return, stating, among other things, substantially the proceedings above set forth. To this return the appellee filed exceptions, which were sustained by the court, and an order was entered discharging the appellee from custody.

The assignment of error calls in question the propriety of the ruling of the Marion superior court in sustaining the exceptions to the return made by the appellant to the writ of habeas corpus. It is contended by the appellee: First. That the power to punish for contempt is a judicial function, which can only be exercised by a court, and, if it be claimed that the act in question makes the state board of tax commissioners a court, then so much of the act as seeks to do so is void, because it is not embraced in the title of the act, and because three of the persons constituting the board are forbidden by the constitution of the state from exercising judicial functions. Second. That, if the board has power to punish for contempt, it can only do so for the refusal of a witness to appear and answer questions pertinent and material to some issue in a suit, action, or proceeding then pending. Third. That the proceedings of the board in this matter are in violation of the provisions of the Constitution of the United States, which provides that "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon reasonable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized." Fourth. That the state board of tax commissioners has no original jurisdiction, except in the matter of the assessment of railway corporations, and equalizing the assessments of real estate.

These several propositions have been ably and exhaustively argued on both sides, not only in the briefs on file, but also orally in open court; but it seems to us that, if the first proposition presented by the appellee, namely, that so much of the statute in question as attempts to confer on the state board of tax commissioners the power to fine and imprison for contempt of its authority is void by reason of being in conflict with the state constitution, can be sustained, the other questions presented do not necessarily or properly arise. If this position cannot be maintained, then some or all of the other propositions do arise, and must be decided by this court. But the first inquiry in a case like this leads naturally to an investigation of the authority under which the complaining party has been deprived of his liberty. The solution of the question presented renders it necessary that we shall inquire—First, as to what department of the state government the state board of tax commissioners belongs; and, second, into the nature of the power to fine and commit for contempt. * * *

It is often a matter of much difficulty to determine whether the functions exercised by a tribunal of this character are such as pertain exclusively to the courts, or whether they are such as it may lawfully exercise. Mr. Mechem on Public Office and Officers (section 637) says: "Quasi judicial functions * * * are those which lie midway between the judicial and ministerial ones. The line separating them from such as are thus on their two sides are necessarily indistinct; but, in general terms, when the law in words or by implication commits to any officer the duty of looking into facts, but after a discretion in its nature judicial, the function is termed quasi judicial."

That it was in the power of the General Assembly to confer on the state board of tax commissioners the power to hear and determine appeals from the county boards of review, to equalize the assessments of real estate, and to assess the railroad property named in the act, is not doubted; and the question as to whether the Legislature could confer upon it the power to fine and imprison the citizens of the state for contempt of its authority depends upon whether such action is purely judicial or only quasi judicial. A proceeding against a person as for a contempt is ordinarily in the nature of a criminal proceeding, and statutes authorizing punishment for contempt of the authority of a tribunal are criminal statutes, and are to be strictly construed. Maxwell v. Rives, 11 Nev. 213; Holman v. State, 105 Ind. 513, 5 N. E. 556.

In the case of Ex parte Doll, 7 Phila. (Pa.) 595, Fed. Cas. No. 3,968, in discharging the prisoner, who had been committed by a commissioner appointed by the United States Circuit Court as for a contempt for refusing to appear and testify and produce certain books, the court said: "I very much doubt the power of Congress to invest a commissioner with authority in a proceeding originally brought be-

fore him to summarily commit a citizen for alleged contempt. This was an exercise of the judicial power of the United States, which, under the Constitution, could not be intrusted to an officer appointed and holding his office in the manner in which they were appointed and held their offices."[26]

Again, in the celebrated case of Kilbourn v. Thompson, 103 U. S. 182, 26 L. Ed. 377, involving the question of the power of Congress to arrest and punish a witness for contempt in refusing to answer questions before a committee of the house, Justice Miller, in speaking for the court said: "The Constitution declares that no person shall be deprived of his life, liberty, or property without due process of law, and it has been repeatedly held by the United States Supreme Court that this means a trial in which the rights of the party shall be decided by a court of justice, appointed by law, and governed by the rules of law previously established."

So again, in the case of In re Mason (D. C.) 43 Fed. 510, in which Mason had been committed by a United States circuit court commissioner for contempt in failing to appear and testify as a witness, the court said: "To arrest and punish for a contempt is the highest exercise of judicial power, and belongs to judges of courts of record or superior courts. Where jurisdiction exists there can be no review. A pardon by the executive is in most cases the mode of release. This power is not, and never has been, an incident to the mere exercise of judicial function, and such power cannot be upheld upon inference and implication, but must be expressly conferred by law."

As bearing upon the question now under discussion, see, also, In re McLean (D. C.) 37 Fed. 648; Anderson v. Dunn, 6 Wheat. 204, 5 L. Ed. 242; Shoultz v. McPheeters, 79 Ind. 373; Vandercook v. Williams, 106 Ind. 345, 1 N. E. 619, 8 N. E. 113; Ex parte Milligan, 4 Wall. 2, 18 L. Ed. 281; Gregory v. State, 94 Ind. 385, 48 Am. Rep. 162; Whitcomb's Case, 120 Mass. 118, 21 Am. Rep. 502.

These cases lead to the inevitable conclusion that the power to punish for contempt belongs exclusively to the courts, except in cases where the Constitution of a state expressly confers such power upon some other body or tribunal. Our state Constitution confers such power upon the General Assembly, but upon no other body. The doctrine that such power rests with the courts alone is based upon the fact that a party cannot be deprived of his liberty without a trial. To adjudge a person guilty of contempt for a refusal to answer questions, the tribunal must determine whether such questions are material, and whether it is a question which the witness is bound to answer; otherwise it cannot be determined that the witness is in contempt of its authority in refusing to answer.

So far as we are informed, the trial of a citizen, involving the question of his liberty, by any civil tribunal other than a court, has never been sustained, unless the power to do so was conferred by some con-

[26] See, also, United States v. Beavers (D. C.) 125 Fed. 778 (1903).

stitutional provision. For the reasons above given, our conclusion is that so much of the act under consideration as attempts to confer on the state board of tax commissioners power to fine and imprison for contempt is in violation of section 1, art. 3, of our state Constitution, and is void. It follows that such board has no authority to fine the appellee, and commit him to the jail of Marion county, and that the Marion superior court did not err in ordering his release. * * *

Judgment affirmed.[27]

INTERSTATE COMMERCE COMMISSION v. BRIMSON et al.

(Supreme Court of United States, 1894. 154 U. S. 447, 14 Sup. Ct. 1125, 38 L. Ed. 1047.)

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

This was a petition by the Interstate Commerce Commission for an order requiring W. G. Brimson, J. S. Keefe, and W. R. Sterling to appear before the commission and answer certain questions, and requiring Keefe and Sterling to produce before the commission certain books. The Circuit Court dismissed the petition. 53 Fed. 476. The commission appealed.

Mr. Justice HARLAN.[28] This appeal brings up for review a judgment rendered December 7, 1892, dismissing a petition filed in the Circuit Court of the United States on the 15th day of July, 1892, by the Interstate Commerce Commission, under the act of Congress entitled "An act to regulate commerce," approved February 4, 1887, and amended by the acts of March 2, 1889, and February 10, 1891. 24 Stat. 379, c. 104; 25 Stat. 855, c. 382; 26 Stat. 743, c. 128; 1 Supp. Rev. St. 529, 684, 891 (U. S. Comp. St. 1901, p. 3154).

The petition was based on the twelfth section of the act authorizing the commission to invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses, and the production of documents, books, and papers.

The Circuit Court held that section to be unconstitutional and void, as imposing on the judicial tribunals of the United States duties that were not judicial in their nature. In the judgment of that court, this proceeding was not a case to which the judicial power of the United States extended. 53 Fed. 476, 480. * * *

[27] See Matter of Sims, 54 Kan. 1, 37 Pac. 135, 25 L. R. A. 110, 45 Am. St. Rep. 261 (1894); De Camp v. Archibald, 50 Ohio St. 618, 35 N. E. 1056, 40 Am. St. Rep. 692 (1893); State ex rel. Haughey v. Ryan, 182 Mo. 349, 81 S. W. 435 (1904).

"It is true that some persons have power to commit, who are not judges, as a constable may commit for an affray committed in his presence; and he is liable to an action if the act is false. The difference is that he does not commit for punishment, but for safe custody." Groenvelt v. Burwell, 1 Ld. Raym. 454, 467 (1699).

[28] Only a portion of the opinion is printed.

The twelfth section (26 Stat. 743, c. 128), the validity of certain parts of which is involved in this proceeding, provides as follows:

"That the commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the commission to perform the duties and carry out the objects for which it was created; and the commission is hereby authorized and required to execute and enforce the provisions of this act; and, upon the request of the commission, it shall be the duty of any district attorney of the United States to whom the commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this act and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this act the commission shall have power to require, by subpœna, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

"Such attendance of witnesses and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpœna the commission, or any party to a proceeding before the commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

"And any of the Circuit Courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpœna issued to any common carrier subject to the provisions of this act, or other person, issue an order requiring such common carrier or other person to appear before said commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding. * * *"

J. S. Keefe, secretary and auditor of the five roads mentioned, was examined by the commission as a witness. He admitted that he had in his possession a book showing the names of the stockholders of the Calumet & Blue Island Railway Company, but refused, upon

the demand of the commission, to produce it. He also refused to answer the question, "Do you know, as a matter of fact, whether the Illinois Steel Company owns the greater part of the stock of these several railroads?"

William R. Sterling, first vice president of the Illinois Steel Company, was also examined as a witness, and, after stating that that company had a contract with the five railroads in question to handle the railroad business at the five "plants" of the steel company, refused to answer the question, "Is that the only relation which your company sustains to these railroad companies?"

On the succeeding day the commission issued a subpœna duces tecum, directed to J. S. Keefe, secretary and auditor of the five railroads in question, commanding him to appear before that body, and bring with him the stock books of those companies. A like subpœna was issued to William R. Sterling, as first vice president of the steel company, commanding him to appear before the commission and produce the stock books of that company. Keefe and Sterling appeared in answer to the subpœnas, but refused to produce the books, or either of them, so ordered to be produced.

The commission thereupon, on the 15th day of July, 1892, presented to and filed in the court below its petition, embodying the above facts, and prayed that an order be made requiring and commanding Brimson, Keefe, and Sterling to appear before that body and answer the several questions propounded by them, and which they had respectively refused to answer, and requiring Keefe and Sterling to appear and produce before the commission the stock books above referred to as in their possession.

The answers of Brimson, Keefe, and Sterling in the present proceeding, besides insisting that the questions propounded to them, respectively, were immaterial and irrelevant, were based mainly upon the ground that so much of the interstate commerce act as empowered the commission to require the attendance and testimony of witnesses and the production of books, papers, and documents, and authorizes the Circuit Court of the United States to order common carriers or persons to appear before the commission and produce books and papers and give evidence, and to punish by process for contempt any failure to obey such order of the court, was repugnant to the Constitution of the United States.

Is the twelfth section of the act unconstitutional and void, so far as it authorizes or requires the Circuit Courts of the United States to use their process in aid of inquiries before the commission? The court recognizes the importance of this question, and has bestowed upon it the most careful consideration.

As the Constitution extends the judicial power of the United States to all cases in law and equity arising under that instrument or under the laws of the United States, as well as to all controversies to which the United States shall be a party (article 3, § 2), and as the Circuit

Courts of the United States are capable, under the statutes defining and regulating their jurisdiction, of exerting such power in cases or controversies of that character, within the limits prescribed by Congress (25 Stat. 434, c. 866), the fundamental inquiry on this appeal is whether the present proceeding is a "case" or "controversy," within the meaning of the Constitution. The Circuit Court, as we have seen, regarded the petition of the Interstate Commerce Commission as nothing more than an application by an administrative body to a judicial tribunal for the exercise of its functions in aid of the execution of duties not of a judicial nature, and accordingly adjudged that this proceeding did not constitute a case or controversy to which the judicial power of the United States could be extended.

At the same time the learned court said: "Undoubtedly, Congress may confer upon a nonjudicial body authority to obtain information necessary for legitimate governmental purposes, and make refusal to appear and testify before it touching matters pertinent to any authorized inquiry an offense punishable by the courts, subject, however, to the privilege of witnesses to make no disclosures which might tend to criminate them or subject them to penalties or forfeitures. A prosecution or an action for violation of such a statute would clearly be an original suit or controversy between parties, within the meaning of the Constitution, and not a mere application, like the present one, for the exercise of the judicial power in aid of a nonjudicial body." In re Interstate Commerce Commission (C. C.) 53 Fed. 476, 480.

In other words, if the interstate commerce act made the refusal of a witness duly summoned to appear and testify before the commission, in respect to a matter rightfully committed by Congress to that body for examination, an offense against the United States, punishable by fine or imprisonment, or both, a criminal prosecution or an information for the violation of such a statute would be a case or controversy to which the judicial power of the United States extended; while a direct civil proceeding, expressly authorized by an act of Congress, in the name of the commission, and under the direction of the Attorney General of the United States, against the witness so refusing to testify, to compel him to give evidence before the commission touching the same matter, would not be a case or controversy of which cognizance could be taken by any court established by Congress to receive the judicial power of the United States.

This interpretation of the Constitution would restrict the employment of means to carry into effect powers granted to congress within much narrower limits than, in our judgment, are warranted by that instrument. * * *

The question so presented is substantially, if not precisely, that which would arise if the witness was proceeded against by an indictment under an act of Congress declaring it to be an offense against

the United States for any one to refuse to testify before the commission after being duly summoned, or to produce books, papers, etc., in his possession upon notice to do so, or imposing penalties for such refusal to testify or to produce the required books, papers, and documents. A prosecution for such offense, or a proceeding by information to recover such penalties, would have as its real and ultimate object to compel obedience to the rightful orders of the commission, while it was exerting the powers given to it by Congress; and such is the sole object of the present direct proceeding. The United States asserts its right, under the Constitution and laws, to have these appellees answer the questions propounded to them by the commission, and to produce specified books, papers, etc., in their possession or under their control. It insists that the evidence called for is material in the matter under investigation; that the subject of investigation is within legislative cognizance, and may be inquired of by any tribunal constituted by Congress for that purpose. The appellees deny that any such rights exist in the general government, or that they are under a legal duty, even if such evidence be important or vital in the enforcement of the interstate commerce act, to do what is required of them by the commission. Thus has arisen a dispute involving rights or claims asserted by the respective parties to it; and the power to determine it directly, and, as between the parties, finally, must reside somewhere. It cannot be that the general government, with all the power conferred upon it by the people of the United States, is helpless in such an emergency, and is unable to provide some method, judicial in form and direct in its operation, for the prompt and conclusive determination of this dispute. * * *[29]

The views we have expressed in the present case are not inconsistent with anything said or decided in those cases. They do not in any manner infringe upon the salutary doctrine that Congress, excluding the special cases provided for in the Constitution—as, for instance, in section 2 of article 2 of that instrument—may not impose upon the courts of the United States any duties not strictly judicial. The duties assigned to the Circuit Courts of the United States by the twelfth section of the interstate commerce act are judicial in their nature. The inquiry whether a witness before the commission is bound to answer a particular question propounded to him, or to produce books, papers, etc., in his possession, and called for by that body, is one that cannot be committed to a subordinate administrative or executive tribunal for final determination. Such a body could not, under our system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment. Except in the particular

[29] The court refers to Gordon v. United States, 117 U. S. 697 (1864), and In re Sanborn, 148 U. S. 222, 13 Sup. Ct. 577, 37 L. Ed. 429 (1893), holding that there is no judgment in the legal sense of the term, when the action of the courts is subject to be set aside by another department of the government.

instances enumerated in the Constitution, and considered in Anderson v. Dunn, 6 Wheat. 204, 5 L. Ed. 242 and in Kilbourn v. Thompson, 103 U. S. 168, 190, 26 L. Ed. 377, of the exercise by either house of Congress of its right to punish disorderly behavior upon the part of its members, and to compel the attendance of witnesses and the production of papers in election and impeachment cases and in cases that may involve the existence of those bodies, the power to impose fine or imprisonment in order to compel the performance of a legal duty imposed by the United States can only be exerted, under the law of the land, by a competent judicial tribunal having jurisdiction in the premises. See Whitcomb's Case, 120 Mass. 118, 21 Am. Rep. 502, and authorities there cited.

Without the aid of judicial process of some kind, the regulations that Congress may establish in respect to interstate commerce cannot be adequately or efficiently enforced. One mode, as already suggested (the validity of which is not questioned), of compelling a witness to testify before the Interstate Commerce Commission to answer questions propounded to him relating to the matter under investigation, and which the law makes it his duty to answer, and to produce books, papers, etc., is to make his refusal to appear and answer, or to produce the documentary evidence called for, an offense against the United States, punishable by fine or imprisonment. A criminal prosecution of the witness under such a statute, it is conceded, would be a case or controversy, within the meaning of the Constitution, of which a court of the United States could take jurisdiction. Another mode would be to proceed by information to recover any penalty imposed by the statute. A proceeding of that character, it is also conceded, would be a case or controversy of which a court of the United States could take cognizance. If, however, Congress, in its wisdom, authorizes the commission to bring before a court of the United States for determination the issues between it and a witness, that mode of enforcing the act of Congress, and of compelling the witness to perform his duty, is said not to be judicial, and is beyond the power of Congress to prescribe.

We cannot assent to any view of the Constitution that concedes the power of Congress to accomplish a named result indirectly, by particular forms of judicial procedure, but denies its power to accomplish the same result directly, and by a different proceeding judicial in form. We could not do so without denying to Congress the broad discretion with which it is invested by the Constitution of employing all or any of the means that are appropriate or plainly adapted to an end which it has unquestioned power to accomplish; namely, the protection of interstate commerce against improper burdens and discriminations. Indeed, of all the modes that could be constitutionally prescribed for the enforcement of the regulations embodied in the interstate commerce act, that provided by the twelfth section is the one which, more than any other, will protect the public against the

devices of those who, taking advantage of special circumstances, or by means of combinations too powerful to be resisted and overcome by individual effort, would subject commerce among the states to unjust and unreasonable burdens.

The present proceeding is not merely ancillary and advisory. It is not, as in Gordon's Case, one in which the United States seeks from the Circuit Court of the United States an opinion that "would remain a dead letter, and without any operation upon the rights of the parties." The proceeding is one for determining rights arising out of specified matters in dispute that concern both the general public and the individual defendants. It is one in which a judgment may be rendered that will be conclusive upon the parties until reversed by this court; and that judgment may be enforced by the process of the Circuit Court. Is it not clear that there are here parties on each side of a dispute involving grave questions of legal rights, that their respective positions are defined by pleadings, and that the customary forms of judicial procedure have been pursued? The performance of the duty which, according to the contention of the government, rests upon the defendants, cannot be directly enforced except by judicial process. One of the functions of a court is to compel a party to perform a duty which the law requires at his hands. If it be adjudged that the defendants are, in law, obliged to do what they have refused to do, that determination will not be merely ancillary and advisory, but, in the words of Sanborn's Case, will be a "final and indisputable basis of action," as between the commission and the defendants, and will furnish a precedent in all similar cases. It will be as much a judgment that may be carried into effect by judicial process as one for money, or for the recovery of property, or a judgment in mandamus commanding the performance of an act or duty which the law requires to be performed, or a judgment prohibiting the doing of something which the law will not sanction. It is none the less the judgment of a judicial tribunal dealing with questions judicial in their nature, and presented in the customary forms of judicial proceedings, because its effect may be to aid an administrative or executive body in the performance of duties legally imposed upon it by Congress in execution of a power granted by the Constitution. * * *[30]

For the reasons stated, the judgment is reversed, and the cause is remanded for further proceedings in conformity with this opinion. Reversed.

Mr. Justice FIELD was not present at the argument, and took no part in the consideration or decision of this case. Mr. Chief Justice FULLER, Mr. Justice BREWER, and Mr. Justice JACKSON, dissent.

[30] See, also, Kentucky & I. Bridge Co. v. Louisville & N. R. Co. (C. C.) 37 Fed. 567, 613, 614, 2 L. R. A. 289 (1889).

In re DAVIES, Atty. Gen.

(Court of Appeals of New York, 1901. 168 N. Y. 89, 61 N. E. 118, 56 L. R. A. 855.)

Appeal from Supreme Court, Appellate Division, Third Department.

In the matter of the petition of John C. Davies, Attorney General, for an order directing Charles W. Morse and others to appear before a referee for examination. From an order of the Appellate Division (55 App. Div. 245, 67 N. Y. Supp. 492), reversing an order of the Special Term denying a motion to vacate and set aside an order directing said Morse and others to appear and be examined under Laws 1899, c. 690, and which vacated such order, the Attorney General appeals. Reversed, and order of Special Term affirmed.

VANN, J.[31] * * * The statute which gives rise to this controversy is entitled "An act to prevent monopolies in articles or commodities of common use, and to prohibit restraints of trade and commerce, providing penalties for violations of the provisions of this act, and procedure to enable the Attorney General to secure testimony in relation thereto." Laws 1899, c. 690. * * *

It authorizes the Attorney General to bring an action in the name of the people against any corporation, foreign or domestic, its officers or agents, or against any person, "to restrain and prevent the doing in this state of any act herein declared to be illegal, or any act, in, toward or for the making or consummation" of any prohibited contract or combination, wherever the same may have been made. Section 3.

It declares that "whenever the Attorney General has determined to commence an action" under the act, before beginning the same he may present to any justice of the Supreme Court an application in writing for an order directing the persons mentioned therein to appear before such justice "or a referee designated in such order, and answer such questions as may be put to them, * * * and produce such papers, documents and books concerning any alleged illegal contract" or combination in violation of the act. Said application "may simply show upon" the "information and belief" of the Attorney General "that the testimony of such person or persons is material and necessary." It is made the duty of the justice to grant the application, with such preliminary injunction as may appear to him to be proper and expedient, and of the witness to attend at the time and place designated. "The testimony of each witness must be subscribed by him, and all must be filed in the office of the clerk of the county in which such order for examination is filed." The provisions of the Code of Civil Procedure relating to the examination of witnesses before the

[31] Only a portion of this case is printed.

commencement of an action "shall not apply except as herein prescribed." Section 4.

The order must be signed by the justice making it, and the Attorney General may indorse upon the same "a clause requiring such person to produce on such examination all books, papers and documents in his possession, or under his control, relating to the subject of such examination." Section 5.

No person is "excused from answering any questions or from producing any books" because the evidence, documentary or otherwise, may tend to incriminate him, but he is protected from criminal prosecution and from any penalty or forfeiture "on account of any transaction, matter or thing concerning which he may testify, or produce" documentary evidence. Section 6.

The referee so appointed is given "all the powers and is subject to all the duties of a referee appointed under section 1018 of the Code of Civil Procedure, so far as practicable, and may punish for contempt a witness duly served as prescribed in this act for nonattendance or refusal to be sworn or to testify, or to produce books," documents, etc., "in the same manner, and to the same extent as a referee appointed to hear, try and determine an issue of fact or of law." Section 7.

Pursuant to this act the Attorney General presented to a justice of the Supreme Court, at chambers, his petition, verified upon information and belief, in which he stated that "as such officer" he had determined to commence an action under said statute in the name of the people against the American Ice Company, a foreign corporation engaged in business in the state of New York, and against its officers and directors, to restrain them "from doing in this state any act in, towards, or for the making or consummation of" a certain contract or combination, "and from doing business in the state of New York, and to vacate, annul, and set aside the certificate procured from the Secretary of State, pursuant to section 15 of the general corporation law, authorizing said company to do business in the state of New York." * * *

The petitioner set forth the names of 28 persons, and alleged that the testimony of each was "material and necessary to the establishment of the unlawful agreement, arrangement, or combination whereby the above-described monopoly in the sale of ice was created and established and has been maintained." The remaining allegations of the petition show the relations of some of the proposed witnesses to the American Ice Company, the opportunity of others for knowing about the combination, and of others still for knowing about other companies in the city of New York whose business had been absorbed by the constituent companies, and through them by the American Ice Company. It is also alleged that the principal office of the American Ice Company is located in the city of New York, and the source of the petitioner's knowledge and the grounds of his belief as to the

truth of the allegations of the petition are briefly stated. The relief asked is that an order be made directing the persons named to appear before a referee, "and answer such questions as may be put to them, or any of them, and produce all papers, documents, and books concerning the aforesaid illegal arrangement, agreement, or combination."

Upon the presentation of this petition the justice made an order requiring Charles W. Morse, who is president of the American Ice Company, and the other persons named, to appear before a referee for the purpose of the examination provided for by the act. Mr. Morse was also directed to produce "all contracts and agreements of the American Ice Company with" 12 other ice companies, as well as certain other contracts relating to the purchase of ice and the plants, business, and good will of ice dealers in the city of New York. He moved to vacate the order, and thus the questions arose that we are called upon to review. * * *

The validity of the procedure authorized by the act, however, is challenged as in violation of both the state and federal Constitutions. The first and second questions certified involve the proposition that the statute imposes other than judicial duties upon a judicial officer, and that for this reason the provisions relating to the procedure are unconstitutional and void. * * *

While the performance of administrative duties cannot be imposed by the Legislature upon the Supreme Court as such, except as to matters incidental to the exercise of judicial powers, yet for many years, and without serious question, acts have been passed conferring upon the justices of that court authority, out of term, to perform a variety of functions, administrative or semiadministrative in character, such as the approval of certificates of incorporation, the acknowledgment of conveyances, the solemnization of marriages, the appointment of commissioners of jurors, the investigation of the financial affairs of villages, and the like. 2 Rev. St. p. 755, § 4; Laws 1847, p. 319, § 1; Laws 1892, c. 682, § 64; Id. c. 685; Laws 1897, c. 194; Id., c. 430. A distinction seems to prevail in practice between powers conferred upon a court and those conferred upon the judges thereof.

The duties of the justice to whom application was made for the order in question were judicial in form. He was not required to grant it as a matter of course, although the language used is mandatory upon its face, as it was in Jenkins v. Putnam, 106 N. Y. 272, 12 N. E. 613, yet we declared that: "While it is said in section 873, Code Civ. Proc., that the judge 'must' grant an order when an affidavit conforming to the requirements of the previous section is presented to him, yet we do not think that the language is absolutely mandatory, and that it was intended to deprive the judge of all discretion. * * * Where the judge can see that the examination is sought merely for annoyance or for delay, and that it is not in fact necessary and material, he ought

not to be required, and cannot absolutely be required, to make the order."

The expressions in the statute, "it shall be the duty of the justice * * * to grant such application," and "the order shall be granted by the justice," do not deprive him of the power to decide whether, upon the facts alleged, the order should be granted. It was his duty to consider the allegations of the petition, and decide whether they made out a case pursuant to the statute, and authorized an order of examination according to its provisions. It was necessary for him to be satisfied judicially that the Attorney General had, in good faith, determined to commence an action, and whether the testimony of the persons named was material and necessary in connection with that action. The statute is not satisfied by a simple statement of the Attorney General in his petition that he is informed and believes that the testimony of such persons is material and necessary, but he must show how and why it is material and necessary. This involves the general nature and object of the action that he has determined to bring. A determination to bring an action, indefinite and undefined, is not what the Legislature contemplated, but one the general character of which is described sufficiently to show that it is founded upon the statute as well as upon probable cause, and that the testimony of the witnesses will be material and necessary therein. Thus the justice is called upon to exercise the judicial function of deciding whether the application conforms to the statute as thus construed, the same as is required of him when an application is made for an order of arrest, a warrant of attachment, or any other provisional remedy. His duty is not merely clerical, but requires the exercise of judgment. When a writ of habeas corpus is applied for, the statute says that the judge "must grant it without delay," and even inflicts a penalty for failure to comply with the command, yet it is his duty to refuse the writ unless the facts required by the code are sufficiently set forth. Code Civ. Proc. § 2020. In all these cases the judge is required to act judicially, for he must decide the question of law whether the facts alleged make out a case under the statute.

But, while the power committed to the justice is judicial in form, unless it is judicial in substance, and has a judicial purpose to accomplish, the duty is of an administrative character only. Since the object of the statute, so far as it relates to procedure, is not expressly stated, it must be inferred from the title and the provisions of the act. The title declares that the object of the procedure is to enable the Attorney General to "secure testimony" in relation to violations of the act, and the text indicates the same purpose. The statute is remedial, and it is the duty of courts to so construe it as to "suppress the mischief and advance the remedy." As no notice to the proposed adverse party is required, and no opportunity is expressly afforded for cross-examination, the testimony cannot be read in evidence upon the trial of the action. The taking of testimony for use upon a trial is part

of the trial itself, so far as the constitutional provision allowing the right to counsel and requiring due process of law is concerned. No judgment can be pronounced, or determination made, based wholly or in part upon such testimony, which is not reported to the judge or court for judicial action.

The only use, so far as we can now see, that can be made of the testimony, is to enable the Attorney General either to prepare his complaint or prepare for trial. The former is a judicial purpose, and is clearly within the power of the Legislature to intrust to the court or its judges. Glenney v. Stedwell, 64 N. Y. 120. It aids directly in framing the issues which the court is to try, tends to prevent the delay resulting from amendments of the complaint, and thus advances the remedy to the end which is to be effected by the judgment. In re Cooper, 22 N. Y. 67, 84. The other use suggested involves a serious question. It is urged that an inquisition into one's private affairs, the compulsory production of his books and papers and the disclosure of his business secrets, is an invasion of personal liberty as guarantied by the Constitution. It is insisted that a proceeding which ends in nothing, that establishes no right and prevents no wrong, either directly or indirectly, is not of a judicial nature. * * *

Through its legislative department the state can examine witnesses with reference to prospective legislation, and why can it not, through its judicial department, under an appropriate statute, examine witnesses in order to establish in court rights belonging to all its citizens, even if the testimony is not to be read in court, but is to be used for a purpose incidental to the trial? * * *

The procedure authorized is in the nature of a statutory bill of discovery. The ancient remedy of enforcing discovery was devised by the courts to compel a party in a pending action at law to discover and set forth upon oath in an independent action every fact and circumstance within his knowledge, information, or belief material to the plaintiff's case. 2 Story, Eq. Jur. (13th Ed.) 811; Adams, Eq. (8th Ed.) 1. A bill of discovery was never brought to a hearing, and there could be no decree on matters set forth therein, for its sole object was to obtain testimony for use in another action. 6 Enc. Pl. & Prac. 781. It would lie even if the other action had not been brought, provided there was an intention to bring it. Stebbins v. Cowles, 10 Conn. 408. The process of thus obtaining testimony has never been regarded as an unauthorized interference with personal liberty, but as due process of law. If the courts themselves, simply of their own motion, can establish such a system, cannot the Legislature create a procedure similar in nature, even if it is more drastic in effect?

It is true that testimony thus taken could be read in evidence upon the trial of the other action, but is this essential to a judicial purpose, or does due process of law require that testimony cannot be taken by a judge, unless it is to be read in court, provided the sovereign power needs it in order to enforce its own laws through judicial proceedings?

Is the state itself, when a litigant, not to establish a mere right of property, but a cause of public justice, limited by its own constitution to the procedure that ordinarily prevails in controversies between individuals, or has it the power through its legislature to authorize testimony to be taken in order to aid its attorney general in attempting to enforce its policy as a political community and to promote the general welfare by proceedings in its courts of justice? Is there no power in government to examine a witness for this purpose? The question is not whether the exercise of the power is wise or discreet, but whether the power exists. We are not called upon to decide whether the thing should be done, but whether it can be done; and care should be taken in making the decision not to hamper the state in the enforcement of law. * * *[32]

We think the duties imposed by chapter 690 of the Laws of 1899 upon justices of the Supreme Court are of a judicial character, because they are incidental to a judicial proceeding; that said statute does not infringe upon personal liberty without due process of law, and does not come within the express or implied prohibition of the state or federal Constitutions. The first question certified should therefore, be answered in the negative, and the second in the affirmative. * * *

The order of the Appellate Division should be reversed, and that of the Special Term affirmed, with costs, and the questions certified answered as indicated in the opinion.

BARTLETT and O'BRIEN, JJ., dissent.

[32] The court then refers to Interstate Commerce Commission v. Brimson, 154 U. S. 447, 14 Sup. Ct. 1125, 38 L. Ed. 1047 (1894), ante, p. 222.

CHAPTER VI

ADMINISTRATIVE EXECUTION

SECTION 29.—DISTRESS WARRANTS

DEN ex dem. MURRAY et al. v. HOBOKEN LAND & IMPROVEMENT CO.

(Supreme Court of the United States, 1855. 18 How. 272, 15 L. Ed. 372.)

Mr. Justice CURTIS delivered the opinion of the court.[1]

This case comes before us on a certificate of division of opinion of the judges of the Circuit Court of the United States for the District of New Jersey. It is an action of ejectment, in which both parties claim title under Samuel Swartwout—the plaintiffs, under the levy of an execution on the 10th day of April, 1839, and the defendants, under a sale made by the marshal of the United States for the District of New Jersey, on the 1st day of June, 1839, by virtue of what is denominated a distress warrant, issued by the solicitor of the treasury under the act of Congress of May 15, 1820, entitled "An act providing for the better organization of the Treasury Department."[2] This act

[1] Only a portion of this case is printed.

As to distress warrants for nonpayment of personal taxes, a very common practice, see Cooley on Taxation, p. 438. As to enforcement of payment of taxes by arrest, see Palmer v. McMahon, 133 U. S. 660, 10 Sup. Ct. 324, 33 L. Ed. 772 (1890).

[2] The provisions of the act of May 15, 1820, bearing upon the question before the court, appear in the Revised Statutes as follows:

"Sec. 3625. Whenever any collector of the revenue, receiver of public money, or other officer who has received the public money before it is paid into the treasury of the United States, fails to render his account, or pay over the same in the manner or within the time required by law, it shall be the duty of the proper auditor to cause to be stated the account of such officer, exhibiting truly the amount due to the United States, and to certify the same to the solicitor of the treasury, who shall issue a warrant of distress against the delinquent officer and his sureties, directed to the marshal of the district in which such officer and his sureties reside. Where the officer and his sureties reside in different districts, or where they, or either of them, reside in a district other than that in which the estate of either may be, which it is intended to take and sell, then such warrant shall be directed to the marshals of such districts respectively." (U. S. Comp. St. 1907, p. 2418.)

"Sec. 3627. The marshal authorized to execute any warrant of distress shall, by himself or by his deputy, proceed to levy and collect the sum remaining due, by distress and sale of the goods and chattels of such delinquent officer; having given ten days' previous notice of such intended sale, by affixing an advertisement of the articles to be sold at two or more public places in the town and county where the goods or chattels were taken, or in the town

having provided, by its first section, that a lien for the amount due should exist on the lands of the debtor from the time of the levy and record thereof in the office of the District Court of the United States for the proper district, and the date of that levy in this case being prior to the date of the judgment under which the plaintiffs' title was made, the question occurred in the Circuit Court, "whether the said warrant of distress in the special verdict mentioned, and the proceedings thereon and anterior thereto, under which the defendants claim title, are sufficient, under the Constitution of the United States and the law of the land, to pass and transfer the title and estate of the said Swartwout in and to the premises in question, as against the lessors of the plaintiff." Upon this question, the judges being of opposite opinions, it was certified to this court, and has been argued by counsel.

No objection has been taken to the warrant on account of any defect or irregularity in the proceedings which preceded its issue. It is not denied that they were in conformity with the requirements of the act of Congress. The special verdict finds that Swartwout was collector of the customs for the port of New York for eight years before the 29th of March, 1838; that, on the 10th of November, 1838, his account, as such collector, was audited by the first auditor, and certified by the first comptroller of the treasury; and for the balance thus found, amounting to the sum of $1,374,119.65, the warrant in question was issued by the solicitor of the treasury. Its validity is denied

or county where the owner of such goods or chattels may reside. If the goods and chattels be not sufficient to satisfy the warrant, the same may be levied upon the person of such officer, who may be committed to prison, there to remain until discharged by due course of law." (U. S. Comp. St. 1907, p. 2419.)

"Sec. 3630. For want of goods and chattels of a delinquent officer, or his sureties, sufficient to satisfy any warrant of distress issued pursuant to the foregoing provisions, the lands, tenements, and hereditaments of such officer and his sureties, after being advertised for at least three weeks in not less than three public places in the county or district where such real estate is situate, before the time of sale, shall be sold by the marshal of such district or his deputy." (U. S. Comp. St. 1907, p. 2419).

"Sec. 3636. Any person who considers himself aggrieved by any warrant of distress issued under the foregoing provisions may prefer a bill of complaint to any district judge of the United States, setting forth therein the nature and extent of the injury of which he complains; and thereupon the judge may grant an injunction to stay proceedings on such warrant altogether, or for so much thereof as the nature of the case requires. But no injunction shall issue till the party applying for it gives bond, with sufficient security, in a sum to be prescribed by the judge, for the performance of such judgment as may be awarded against him; nor shall the issuing of such injunction in any manner impair the lien produced by the issuing of the warrant. And the same proceedings shall be had on such injunction as in other cases, except that no answer shall be necessary on the part of the United States; and if, upon dissolving the injunction, it appears to the satisfaction of the judge that the application for the injunction was merely for delay, the judge may add to the lawful interest assessed on all sums found due against the complainant such damages as, with such lawful interest, shall not exceed the rate of ten per centum a year. Such injunction may be granted or dissolved by the district judge either in or out of court." (U. S. Comp. St. 1907, p. 2421.)

by the plaintiffs, upon the ground that so much of the act of Congress as authorized it, is in conflict with the Constitution of the United States.

In support of this position, the plaintiff relies on that part of the first section of the third article of the Constitution which requires the judicial power of the United States to be vested in one Supreme Court and in such inferior courts as Congress may, from time to time, ordain and establish, the judges whereof shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office. Also, in the second section of the same article, which declares that the judicial power shall extend to controversies to which the United States shall be a party.

It must be admitted that, if the auditing of this account, and the ascertainment of its balance, and the issuing of this process, was an exercise of the judicial power of the United States, the proceeding was void; for the officers who performed these acts could exercise no part of that judicial power. They neither constituted a court of the United States, nor were they, or either of them, so connected with any such court as to perform even any of the ministerial duties which arise out of judicial proceedings.

The question, whether these acts were an exercise of the judicial power of the United States, can best be considered under another inquiry, raised by the further objection of the plaintiff, that the effect of the proceedings authorized by the act in question is to deprive the party, against whom the warrant issues, of his liberty and property, "without due process of law," and, therefore, is in conflict with the fifth article of the amendments of the Constitution.

Taking these two objections together, they raise the questions whether, under the Constitution of the United States, a collector of the customs, from whom a balance of account has been found to be due by accounting officers of the treasury, designated for that purpose by law, can be deprived of his liberty, or property, in order to enforce payment of that balance, without the exercise of the judicial power of the United States, and yet by due process of law, within the meaning of those terms in the Constitution; and if so, then, secondly, whether the warrant in question was such due process of law. * * *

That the warrant now in question is legal process is not denied. It was issued in conformity with an act of Congress. But is it "due process of law"? The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process "due process of law" by its mere

will. To what principles, then, are we to resort to ascertain that process, enacted by Congress, is due process? To this the answer must be twofold. We must examine the Constitution itself to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. We apprehend there has been no time, since the establishment of the English monarchy, when there has not been, by the law of the land, a summary method for the recovery of debts due to the Crown, and especially those due from receivers of the revenues. * * *

It is certain that this diversity in "the law of the land" between public defaulters and ordinary debtors was understood in this country, and entered into the legislation of the colonies and provinces, and more especially of the states, after the Declaration of Independence and before the formation of the Constitution of the United States. Not only was the process of distress in nearly or quite universal use for the collection of taxes, but what was generally termed a warrant of distress, running against the body, goods, and chattels of defaulting receivers of public money, was issued to some public officer, to whom was committed the power to ascertain the amount of the default, and by such warrant proceed to collect it. Without a wearisome repetition of details, it will be sufficient to give one section from the Massachusetts act of 1786: "That if any constable or collector, to whom any tax or assessment shall be committed to collect, shall be remiss and negligent of his duty, in not levying and paying unto the treasurer and receiver general such sum or sums of money as he shall from time to time have received, and as ought by him to have been paid within the respective time set and limited by the assessor's warrant, pursuant to law, the treasurer and receiver general is hereby empowered, after the expiration of the time so set, by warrant under his hand and seal, directed to the sheriff or his deputy, to cause such sum and sums of money to be levied by distress and sale of such deficient constable or collector's estate, real and personal, returning the overplus, if any there be; and, for want of such estate, to take the body of such constable or collector, and imprison him until he shall pay the same; which warrant the sheriff or his deputy is hereby empowered and required to execute accordingly." Then follows another provision, that if the deficient sum shall not be made by the first warrant, another shall issue against the town; and if its proper authorities shall fail to take the prescribed means to raise and pay the same, a like warrant of distress shall go against the estates and bodies of the assessors of such town. Laws Mass. vol. 1, p. 266. Provisions not distinguishable from these in principle may be found in the acts of Connecticut, Revision 1784, p. 198; of Pennsylvania, 1782, 2 Laws, Pa., 13; of

South Carolina, 1788, 5 Stat. S. C., 55; New York, 1788, 1 Jones & Varick's Laws, 34. See, also, 1 Henning's St. Va., 319, 343; 12 Henning's St. Va., 562; Laws Vt. 1797, 1800, 340.

Since the formation of the Constitution of the United States, other states have passed similar laws. See Union Towboat Company v. Bordelon, 7 La. Ann. 192. Congress, from an early period, and in repeated instances, has legislated in a similar manner. By the fifteenth section of the "Act to lay and collect a direct tax within the United States," of July 14, 1798, the supervisor of each district was authorized and required to issue a warrant of distress against any delinquent collector and his sureties, to be levied upon the goods and chattels, and for want thereof upon the body of such collector; and, failing of satisfaction thereby, upon the goods and chattels of the sureties. 1 Stat. 602. And again, in 1813 (3 Stat. 33, § 28) and 1815 (3 Stat. 177, § 33), the comptroller of the treasury was empowered to issue a similar warrant against collectors of the customs and their sureties. This legislative construction of the Constitution, commencing so early in the government, when the first occasion for this manner of proceeding arose, continued throughout its existence, and repeatedly acted on by the judiciary and the executive, is entitled to no inconsiderable weight upon the question whether the proceeding adopted by it was "due process of law." Prigg v. Pennsylvania, 16 Pet. 621, 10 L. Ed. 1060; United States v. Nourse, 9 Pet. 8, 9 L. Ed. 31; Randolph's Case, 2 Brock. 447, Fed. Cas. No. 11,558; Nourse's Case, 4 Cranch, C. C. 151, Fed. Cas. No. 15,901; Bullock's Case, cited 6 Pet. 485, note.

Tested by the common and statute law of England prior to the emigration of our ancestors, and by the laws of many of the states at the time of the adoption of this amendment, the proceedings authorized by the act of 1820 cannot be denied to be due process of law, when applied to the ascertainment and recovery of balances due to the government from a collector of customs, unless there exists in the Constitution some other provision which restrains Congress from authorizing such proceedings. For, though "due process of law" generally implies and includes, actor, reus, judex, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings (2 Inst. 47, 50; Hoke v. Henderson, 15 N. C. 15, 25 Am. Dec. 677; Taylor v. Porter, 4 Hill [N. Y.] 146, 40 Am. Dec. 274; Vanzant v. Waddel, 2 Yerg. [Tenn.] 260; State Bank v. Cooper, 2 Yerg. [Tenn.] 599, 24 Am. Dec. 517; Jones's Heirs v. Perry, 10 Yerg. [Tenn.] 59, 30 Am. Dec. 430; Greene v. Briggs, 1 Curt. 311, Fed. Cas. No. 5,764), yet this is not universally true. There may be, and we have seen that there are, cases, under the law of England after Magna Charta, and as it was brought to this country and acted on here, in which process, in its nature final, issues against the body, lands, and goods of certain public debtors without any such trial; and this brings us to the question, whether those provisions of

the Constitution which relate to the judicial power are incompatible with these proceedings? * * *

The power to collect and disburse revenue, and to make all laws which shall be necessary and proper for carrying that power into effect, includes all known and appropriate means of effectually collecting and disbursing that revenue, unless some such means should be forbidden in some other part of the Constitution. The power has not been exhausted by the receipt of the money by the collector. Its purpose is to raise money and use it in payment of the debts of the government, and, whoever may have possession of the public money, until it is actually disbursed, the power to use those known and appropriate means to secure its due application continues.

As we have already shown, the means provided by the act of 1820 do not differ in principle from those employed in England from remote antiquity—and in many of the states, so far as we know without objection—for this purpose, at the time the Constitution was formed. It may be added that probably there are few governments which do or can permit their claims for public taxes, either on the citizen or the officer employed for their collection or disbursement, to become subjects of judicial controversy, according to the course of the law of the land. Imperative necessity has forced a distinction between such claims and all others, which has sometimes been carried out by summary methods of proceeding, and sometimes by systems of fines and penalties, but always in some way observed and yielded to. * * *

It is necessary to take into view some settled rules. Though generally, both public and private wrongs are redressed, through judicial action, there are more summary extrajudicial remedies for both. An instance of extrajudicial redress of a private wrong is the recapture of goods by their lawful owner; of a public wrong, by a private person, is the abatement of a public nuisance; and the recovery of public dues by a summary process of distress, issued by some public officer authorized by law, is an instance of redress of a particular kind of public wrong, by the act of the public through its authorized agents. There is, however, an important distinction between these. Though a private person may retake his property, or abate a nuisance, he is directly responsible for his acts to the proper judicial tribunals. His authority to do these acts depends not merely on the law, but upon the existence of such facts as are, in point of law, sufficient to constitute that authority, and he may be required, by an action at law, to prove those facts; but a public agent, who acts pursuant to the command of a legal precept, can justify his act by the production of such precept. He cannot be made responsible in a judicial tribunal for obeying the lawful command of the government; and the government itself, which gave the command, cannot be sued without its own consent.

At the same time there can be no doubt that the mere question, whether a collector of the customs is indebted to the United States,

may be one of judicial cognizance. It is competent for the United States to sue any of its debtors in a court of law. It is equally clear that the United States may consent to be sued, and may yield this consent upon such terms and under such restrictions as it may think just. Though both the marshal and the government are exempt from suit for anything done by the former in obedience to legal process, still Congress may provide by law that both, or either, shall, in a particular class of cases, and under such restrictions as they may think proper to impose, come into a court of law or equity and abide by its determination. The United States may thus place the government upon the same ground which is occupied by private persons who proceed to take extrajudicial remedies for their wrongs, and they may do so to such extent, and with such restrictions, as may be thought fit.

When, therefore, the act of 1820 enacts that, after the levy of the distress warrant has been begun, the collector may bring before a district court the question whether he is indebted as recited in the warrant, it simply waives a privilege which belongs to the government, and consents to make the legality of its future proceedings dependent on the judgment of the court. As we have already stated in case of a private person, every fact upon which the legality of the extrajudicial remedy depends may be drawn in question by a suit against him. The United States consents that this fact of indebtedness may be drawn in question by a suit against them. Though they might have withheld their consent, we think that, by granting it, nothing which may not be a subject of judicial cognizance is brought before the court.

To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper. Equitable claims to land by the inhabitants of ceded territories form a striking instance of such a class of cases; and as it depends upon the will of Congress whether a remedy in the courts shall be allowed at all, in such cases, they may regulate it and prescribe such rules of determination as they may think just and needful. * * *

To apply these principles to the case before us, we say that, though a suit may be brought against the marshal for seizing property under such a warrant of distress, and he may be put to show his justification, yet the action of the executive power in issuing the warrant, pursuant to the act of 1820, passed under the powers to collect and disburse the

revenue granted by the Constitution, is conclusive evidence of the facts recited in it, and of the authority to make the levy; that though no suit can be brought against the United States without the consent of Congress, yet Congress may consent to have a suit brought, to try the question whether the collector be indebted, that being a subject capable of judicial determination, and may empower a court to act on that determination, and restrain the levy of the warrant of distress within the limits of the debt judicially found to exist.

It was further urged that, by thus subjecting the proceeding to the determination of a court, it did conclusively appear that there was no such necessity for a summary remedy, by the action of the executive power, as was essential to enable Congress to authorize this mode of proceeding.

But it seems to us that the just inference from the entire law is that there was such a necessity for the warrant and the commencement of the levy, but not for its completion, if the collector should interpose, and file his bill and give security. The provision that he may file his bill and give security, and thus arrest the summary proceedings, only proves that Congress thought it not necessary to pursue them, after such security should be given, until a decision should be made by the court. It has no tendency to prove that they were not, in the judgment of Congress, of the highest necessity under all other circumstances; and of this necessity Congress alone is the judge. * * *[3]

[3] Accord: Weimer v. Bunbury, 30 Mich. 201 (1874), under Comp. Laws Mich. 1871, § 1029. The provision is not to be found in the revision of the tax law of 1885, No. 153.

See, also, Eve v. State, 21 Ga. 50 (1857); Gwin v. Barton, 6 How. 7, 12 L. Ed. 321 (1848).

Laws Ill. 1855, Auditor's Report to the General Assembly: "The Constitutionality of so much of the revenue law as authorizes the auditor to issue stress warrants, with orders to sell the property, of delinquent collectors, etc., has been questioned, and as it has but little, if any, advantage over the regular mode of proceeding in the courts against such collectors, I respectfully suggest its repeal." The provision was omitted from the revenue law of 1872. See, now, Illinois Revenue Act (Hurd's Rev. St. 1910, c. 120) §§ 245, 259.

See Century Digest, Taxation, §§ 1095–1101.

Administrative imposition of penalties for fraudulent evasion of taxes, see Doll v. Evans, Fed. Cas. No. 3969 (1872). People v. Nat. Bank, etc., 123 Cal. 53, 55 Pac. 685, 45 L. R. A. 747, 69 Am. St. Rep. 32 (1898); Boyer v. Jones, 14 Ind. 354 (1860); McCormick v. Fitch, 14 Minn. 252, Gil. 185 (1869).

Tariff Bill 1846, § 9, provided that in all cases in which the appraisers should suspect that goods were fraudulently undervalued the government might seize the goods, and sell them at public auction, and after paying the consignee the declared value with 5 per cent. in addition, cover the balance into the treasury. This passed the House, but, being denounced as unconstitutional, was on motion of Webster, struck out by the Senate. Stanwood, American Tariff Controversies, II, 79.

SECTION 30.—ABATEMENT OF NUISANCES—RECOGNITION AND VALIDITY OF POWER

NEFF v. PADDOCK et al.

(Supreme Court of Wisconsin, 1870. 26 Wis. 546.)

Trespass quare clausum for the removal of plaintiff's fence. Defense, that the locus was part of a well-known and long-traveled highway, upon which plaintiff had willfully built his fence, and that defendants removed it by direction of the town board of supervisors, doing no unnecessary damage.

COLE, J.[4] * * * The court in effect instructed the jury that if they found that the fence erected by the plaintiff in the highway extended more than six feet from the East line of the road into the same, so as to endanger or inconvenience travel thereon, then it was the duty of the supervisors to cause the fence to be removed, doing no unnecessary damage, and that such action on their part was lawful. The plaintiff removed his fence into the middle of the highway, and by so doing committed a nuisance. It was the duty of the supervisors to cause the fence to be removed summarily. The public have the right to an uninterrupted passage along the highway for themselves and carriages; and it is the clear legal duty of the supervisors to cause all obstructions to be removed which seriously interfere with or impede the exercise of this right. It would be a most serious defect in the law if in the case of a palpable obstruction of a highway, which interrupts its use and discommodes and endangers the safety of travelers, the public authorities had not the right to remove it without delay. We do not think that such is the law in this state. Lemon v. Haydon, 13 Wis. 159; Wyman v. State, Id. 663; Wetmore v. Tracy, 14 Wend. (N. Y.) 250, 28 Am. Dec. 525. * * *[5]

[4] Only a portion of the opinion of Cole, J., is printed.

[5] Wetmore v. Tracy, 14 Wend. (N. Y.) 250, 28 Am. Dec. 525 (1835), was a case of abatement by private individuals. The doctrine of the earlier New York cases (Hart v. Mayor of Albany, 9 Wend. [N. Y.] 589, 24 Am. Dec. 165 [1832]; Meeker v. Van Rensselaer, 15 Wend. [N. Y.] 397 [1836]), that any individual may abate a public nuisance, is changed by Ft. Plain Bridge Co. v. Smith, 30 N. Y. 44, 62 (1864), which holds that no one has the right to abate a public nuisance, unless he has himself sustained some damages not sustained by the rest of the community.

Blackstone, bk. 3, c. 1, says: "If a new gate be erected across the public highway, which is a common nuisance, any of the king's subjects passing that way may cut it down and destroy it," and "such nuisance may be abated—that is, taken away or removed—by the party aggrieved thereby, so as he commits no riot in the doing of it."

So especially there is no common-law right of summary abatement by individuals, where the nuisance consists only in the violation of the law, as, e. g., the illegal sale of liquor, see Brown v. Perkins, 12 Gray (Mass.) 89

HUBBELL v. GOODRICH et al.

(Supreme Court of Wisconsin, 1875. 37 Wis. 84.)

Appeal from the circuit court for Sauk county.

This action is to recover damages for an alleged trespass by the defendants in entering upon the lands of the plaintiff and taking down and removing a fence. The answer avers that the locus in quo is a public highway; that the defendant Goodrich, who was then overseer of highway in the road district in which such lands are situated, entered upon the plaintiff's said land, and, with the assistance of the other defendant, removed such fence out of the highway, doing no unnecessary damage; and that he removed the fence by order of the supervisors of the proper town.

The testimony given on the trial of the action tends to prove these averments of the answer, and also tends to prove that the fence was an obstruction to travel on the alleged highway.

The jury found for the defendant, a motion for a new trial was denied, and judgment against the plaintiff for costs was duly entered. The plaintiff appealed from such judgment.

LYON, J. 1. The supervisors are charged by law with the care of the highways in their respective towns, and it is their duty to give directions for repairing the same, and from time to time to require overseers of highways therein to perform their duties. Rev. St. c. 19, § 1 (Tayl. St. p. 477, § 1). The supervisors have power, and it is their duty, to cause the summary removal of any public nuisance found in any highway under their jurisdiction. Neff v. Paddock, 26 Wis. 546. And to this end they may require the overseer in whose district it is located so to remove the same.

Any obstruction in or encroachment upon a highway, which unnecessarily impedes or incommodes the lawful use of such highway by the public, is a public nuisance, and may be summarily abated. Angell on Highways, 223, 274.

2. The supervisors also have the power, as we think, to cause the summary removal of any structure unlawfully and willfully placed within the limits of a highway by any person, although the same is not a public nuisance. As to the signification of the word "willfully," as here used, see State v. Preston, 34 Wis. 675.

(1858); Earp v. Lee, 71 Ill. 192 (1873); Gray v. Ayres, 7 Dana (Ky.) 375, 32 Am. Dec. 107 (1838).

Where the right of any individual to abate a nuisance is recognized, it may be exercised, a fortiori, by an officer. Fields v. Stokley, 99 Pa. 306, 44 Am. Rep. 109 (1882); Baumgartner v. Hasty, 100 Ind. 575, 50 Am. Rep. 830 (1885).

But such abatement must be unaccompanied by a breach of the peace. Rex v. Rosewell, 2 Salk. 459 (1699); Day v. Day, 4 Md. 262 (1853).

See F. J. Goodnow, Summary Abatement of Nuisances, Columbia Law Review, II, 203.

3. But where the obstruction or encroachment is not a public nuisance, and was not willfully placed in the highway (as where it was placed there by inadvertence or carelessness, without any intention to obstruct the highway), we are of the opinion that the supervisors have no power to cause the summary removal thereof. The remedy given by the statute must be resorted to in such a case. Rev. St. c. 19, §§ 102 to 108 (Tayl. St. p. 508, §§ 138 to 144); Wyman v. State, 13 Wis. 663.

The learned circuit judge instructed the jury that the defendants were not liable for removing such portion of the fence as was in a public highway, and that if all of the fence removed by them was within the highway the defendants were entitled to a verdict. This instruction is not qualified in any manner, and it entirely ignores the principle last above stated. Under it the action might be defeated even though the fence was not a public nuisance, and was not willfully placed there by the plaintiff; in which case, as we have seen, the town authorities had no power to remove it summarily. We do not know but the verdict was predicated upon precisely such a state of facts; for the testimony does not conclusively prove either that the fence was a public nuisance, or that it was willfully placed there by the plaintiff.

It was error, therefore, to give the above instruction; and because the error may have injured the plaintiff, there must be another trial.

Judgment reversed, and new trial awarded.[6]

[6] The English authorities are silent as to the power of officers, such as surveyors of highways, etc., to remove or abate nuisances, apart from statute, without judicial order or conviction. See Shaw's Parish Law, 1750.

A sheriff or constable seems to have no such power, by virtue of his office, by the common law.

The statutes were slow in granting such power. See 13 Geo. III, c. 78, § 12 (only after 20 days' notice), and 5 & 6 William IV, c. 50, §§ 69, 73. See 2 Ell. & Bl. 748; also 57 Geo. III, c. 29 (Michel Angelo Taylor's Act, relating to London, a private act) § 65.

For American legislation, see the following:

Prov. Laws Mass. 1693–94, c. 6 (Highways):

"Section 1. * * * The surveyors are hereby empowered to cut down, dig up, and remove, as well all sorts of trees, bushes, stones, fences, rails, gates, inclosures, or other thing or things, as may any ways straighten, hurt, hinder, or incommode the highways."

"Sec. 5. If any person * * * shall erect or set up any gate, rails, or fence upon or across any highway or country road, or continue any such road to the annoyance and incumbrance of the same (other than such as shall be allowed by the court of quarter sessions within the county), it shall be deemed a common nuisance, and it shall be lawful for any person or persons to pull down and remove the same."

1 Rev. St. N. Y. 1829, p. 521:

"Sec. 103. In every case where a highway shall have been laid out, and the same has been or shall be encroached upon by fences, * * * the commissioners of highways * * * shall, if in their opinion it be deemed necessary, order such fences to be removed, so that such highway may be of the breadth originally intended. The commissioners making the order shall cause the same to be reduced to writing and signed. They shall also give notice in writing to the occupant of the land, to remove such fences within sixty

KING v. DAVENPORT, Executor.

(Supreme Court of Illinois, 1881. 98 Ill. 305, 38 Am. Rep. 89.)

Mr. Justice SHELDON delivered the opinion of the court.[7]

The city of Jacksonville, in this state, having power, by ordinance, to establish fire limits and to declare the building or repairing of buildings with combustible materials within the fire limits a nuisance, its city council did, by ordinance, establish fire limits, and enacted that any building built or repaired with other than fire-proof material, or any roof or gutter placed on any building, the outer surface of which was made with materials other than fire-proof, if within the fire limits, and done without permission, should be deemed a nuisance, and that if the offender, upon reasonable notice, failed to remove such wooden building, or wooden part of such building, the city marshal, upon the written direction of the mayor, should "remove or tear down such building, or such part thereof as may be necessary." The ordinance further provided, that the offender should be subject to a fine of $100 for each week he failed to remove such wooden building, or wooden part thereof, and that if the city caused the removal, the expense of the removal might be recovered of the offender. The plaintiff's testatrix violated this ordinance by taking off an old and out of repair shingle roof from her building, situated within the fire limits, and putting thereon, without permission, a new shingle roof. She failing to remove the same upon due notice, the roof was removed by the city marshal, in conformity with the ordinance.

She brought this suit of trespass against the mayor and marshal of the city for the removing of the roof, and dying since the bringing of the suit, her executor was substituted as plaintiff. The defendants justified under the ordinance, and on trial by the court, without a jury, judgment was rendered against them for $175, which, on appeal to the Appellate Court for the Third District, was affirmed,

days. Every such order and notice shall specify the breadth of the road originally intended, the extent of the encroachment, and the place or places in which the same shall be.

"Sec. 104. If such removal shall not be made, within sixty days after the service of such notice, the occupant to whom the notice shall be given shall forfeit the sum of fifty cents for every day, after the expiration of that time for which such fences shall continue unremoved."

In Wetmore v. Tracy, 14 Wend. 250, 28 Am. Dec. 525 (1835), this was held not to supersede the common-law remedy by abatement.

The following words were added to this section by chapter 300 of Laws of 1840:

"And the commissioners of highways may remove or cause to be removed such encroachment, and the occupant of the premises shall pay to the commissioners of highways all reasonable charges therefor."

Revised Municipal Code of Chicago, § 1862:

"Sec. 1862. The commissioner of public works may direct the removal of any article or thing whatsoever, which may encumber or obstruct any street, avenue or alley in the city."

[7] Only a portion of the opinion of Sheldon, J., is printed.

and then the present appeal taken, the proper certificate having been made to authorize it.

The sole question here presented is upon the validity of the ordinance.

By its charter the following legislative power is delegated to the city of Jacksonville:

"The city council, for the purposes of guarding against the calamities of fire, shall have power to prohibit the erection, placing or repairing of wooden buildings within the limits prescribed by them, without their permission, and direct and prescribe that all buildings within the limits prescribed shall be made or constructed of fire-proof materials, and to prohibit the rebuilding of wooden buildings; to declare all dilapidated buildings to be a nuisance, and to direct the same to be removed, repaired or abated, in such manner as they shall prescribe and direct; to declare all wooden buildings which they may deem dangerous to contiguous buildings, or in causing or promoting fires, to be nuisances, and to require and cause the same to be removed or abated in such manner as they shall prescribe.

"And, generally, to establish such regulations for the prevention and extinguishment of fires as the city council may deem expedient.

"The city council shall have power to pass, publish, and repeal all ordinances, rules and police regulations, not contrary to the Constitution and laws of the United States and of this state, * * * or proper to carry into effect the powers vested by this act in the corporation; to determine what shall be a nuisance and provide for the punishment, removal and abatement of the same; and also to punish violations of its ordinances by fines, penalties and imprisonment," etc.

"To define and declare what shall be nuisances, and authorize and direct the summary abatement thereof."

There is here given ample authority, we think, for the passage of the ordinance in question.

The inquiry then must be, whether the enactment of such a law is within the competency of legislative power. Unwholesome trades, slaughterhouses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead, may all, says Chancellor Kent, be interdicted by law in the midst of dense masses of population, on the general and rational principle that every person ought so to use his property as not to injure his neighbors, and that private interests must be made subservient to the general interests of the community. 2 Kent, Com. 340. The right to restrain owners of land in towns from erecting wooden buildings, except under certain restrictions, has never been doubted, or, if it has been, the doubt has long since been removed. Commonwealth v. Tewksbury, 11 Metc. (Mass.) 58. Such regulation is but "a just restraint of an injurious use of property, which the Legislature have authority to make." Id. 59. But the particular respect in which the ordinance

is assailed is that it authorizes the abatement of the nuisance summarily, without any prior adjudication of the right to exercise the power.

The summary abatement of nuisances is a remedy which has ever existed in the law, and its exercise is not regarded as in conflict with constitutional provisions for the protection of the rights of private property. Blackstone, in his classification of remedies by the act of a party, says: "The fourth species of remedy by the mere act of the party injured is the abatement or removal of nuisance" (3 Black. Com. 5), and that "the reason why the law allows this private and summary method of doing one's self justice is because injuries of this kind, which obstruct or annoy such things as are of daily convenience for use, require an immediate remedy, and cannot wait the slow progress of the ordinary forms of justice." * * *

There can be no doubt, it seems to us, that the ordinance in question was a police regulation, proper, and made in good faith, "for the purpose of guarding against the calamities of fire," in a populous neighborhood; and we must regard it as an entirely reasonable regulation. There is no more frequent or admittedly proper exercise of the police power than that of the prohibition of the erection of buildings of combustible materials in the populous part of a town, and the only means of making such prohibition effectual is by summary abatement. Every moment's delay in the removal of the nuisance is constant exposure to danger. Before any judicial inquiry and hearing could be had in the matter, the whole evil sought to be guarded against might be produced.

The imposition of a penalty would but punish the offender; it would not remove the source of danger. This latter is the thing which the necessity of the case requires, and immediate abatement is the only competent remedy. It is admitted by appellee's counsel, an admission they are compelled to make under the law, that if the erection were a nuisance at common law the city authorities might abate it. But what is a nuisance at common law? Blackstone's definition is, whatever unlawfully annoys or doth damage to another is a nuisance. The construction of this wooden roof was an unlawful thing, made so by ordinance prohibiting its construction. That it was, in its nature, injurious, and a source of constant danger in a populous place, experience and the general prevalence of this sort of legislation we are considering teach us. Such was the view of the Legislature in the matter, that by the charter of this city, for the purpose of guarding against the calamities of fire, they authorized the city council to prohibit the erection or repairing of wooden buildings within the fire limits they might prescribe, and to declare such buildings to be nuisances, and cause the same to be abated as they should direct.

In pursuance of such authority, the city council established fire limits, and by ordinance declared any such roof as the one in ques-

tion, which should be put upon a building within such limits, to be a nuisance, and required the city marshal, under an order from the mayor, to remove the same.

Such an ordinance, enacted in pursuance of legislative authority, has the force of a statute, and may be viewed as though such, in the treatment of the present subject. We have here, then, what is a nuisance in fact, that which is declared to be such by ordinance—determined by law to be a nuisance—and why may not the remedy by abatement, under the ordinance, belong to it as well as in the case of any nuisance at the common law? The reason for it is equally strong. As before said, there is no other competent remedy to meet the necessity of the case.

Further, the charter authorizes the provision for summary abatement, and the ordinance consequently gives it. How is a nuisance to be abated by the city except by a summary proceeding? The term itself imports such a proceeding. This case is quite different from Yates v. Milwaukee, 10 Wall. 497, 19 L. Ed. 984, cited by appellee's counsel, where the court held that the mere declaration of the city council could not make an existing structure a nuisance unless it had in fact that character, and that it was not allowable "that a municipal corporation, without any general laws, either of the city or of the state, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself." The thing here, we regard, had the character of a nuisance. It was constructed in the face of a general ordinance of the city, long before passed, prohibiting any such structure, and declaring it to be a nuisance and subject to be abated as such. It was a reasonable regulation for the future, and plaintiff's defiant disobedience of it leaves her no reason for complaint of the declared consequences. * * *

The judgment of the Appellate Court is reversed, and the cause remanded for further proceedings in conformity with this opinion.

Judgment reversed.

WALKER, J. I am unable to concur in either the reasoning or conclusion announced in this opinion.

BALDWIN et al. v. SMITH.

(Supreme Court of Illinois, 1876. 82 Ill. 162.)

Mr. Justice BREESE delivered the opinion of the court.

This was trespass with force and arms, brought to the White circuit court by Michael Smith, plaintiff, and against the town of Grayville and William F. Baldwin, the president, and Benjamin Batson and others, members of the town council, and Isaac H. Hamilton, constable of the town of Grayville, defendants.

The defendants pleaded the general issue, and several special pleas, to which latter demurrers were sustained, and the cause tried upon the general issue. The jury found for the plaintiff, assessing his damages at $220, whereupon a motion for a new trial was made by the defendants. Thereupon the plaintiff remitted $70, and judgment was rendered for $150, to reverse which the defendants, except W. Wirt Gray and Henry Butler, appeal, and assign various errors.

It is unnecessary to consider all the errors assigned, or go into a critical examination of the special pleas adjudged bad, as the whole controversy is confined within a narrow compass.

It appears the plaintiff had been duly licensed, by the proper authorities of the town of Grayville, to retail spirituous liquors—in other words, to keep a dramshop—for which he had paid $200 into the town treasury, and had "complied with the laws and ordinances."

There is no condition in the license, and no reference to any ordinance of the town, authorizing its revocation for cause, yet it must be held to have been granted subject to such ordinances of the town as had a legal existence at the time the same was granted, and such as were within the competency of the town authorities to enact.

An ordinance of the town, entitled "License, Groceries," is set up in one or more of the special pleas, on three sections of which, namely, sections 2, 3 and 4, the defense is based.

Section 2 provides for the execution of a bond by the applicant for a license, conditioned that he will keep an orderly house, and observe the conditions contained in section 3, which provides that license should be granted only on the express condition that the applicant should keep an orderly house, permit no gaming or playing with cards, and should not sell, give, or otherwise dispose of to any minor under sixteen years of age, liquor of any kind. And by section 4, on which section the controversy turns, it is provided that the town council, being satisfied, upon complaint or otherwise, that the third section, or any clause thereof, has been violated, shall, in addition to the forfeiture and collection of the bond, revoke the license of such offender or offenders; and it shall be the duty of the town constable to immediately close up the grocery of such offender or offenders.

The town council, it would appear, having become satisfied, "by complaint or otherwise," that the third section of the ordinance, or some part thereof, had been violated by the licensee, entered into an investigation of the matter, having the plaintiff before them, who was examined as a witness, and they found him guilty, revoked his license, and ordered the town constable to close the saloon, which he did by turning out the clerk then in possession, locking the doors and taking the key, thus assuming control over the premises.

Now, the only question is, had the town council, under this section of the ordinance, the power to do the acts, by and through the town constable, they admit, by their pleas, they did do?

We are satisfied they had no such power. Admitting they could

revoke the license, and did revoke it, there their power ended. They had no right, manu forti, to oust the owner from the premises, and thus deprive him of the use and control of his property, nor was there any necessity for so acting. The revocation of the license was, virtually, closing the doors of the saloon as to the traffic in liquors. Should the keeper of the saloon, after the revocation, continue to sell liquor as under the license, he would be subject to indictment and punishment under the law.

The town council had no more power to authorize the town constable to do the acts which he admits he did do than to authorize him to imprison the supposed offender, at his discretion. The investigation by the town council amounts to nothing, as that was not a judicial tribunal, empowered to make such investigations, and condemn and punish. Such proceedings as we find in this record are violative of the elementary principles of our Constitution and laws, which give to any man the right of trial by a jury, and in a court of competent jurisdiction. His guilt cannot be inquired into by a town council, and their decree enforced by a town constable, with impunity. The party charged with a violation of the ordinance had a right to be heard in court, and to receive its judgment.

The defense being based on this section of the ordinance, and that being invalid, the demurrers to the pleas setting that up as a defense were properly sustained.

This opinion proceeds upon the ground that the charter of the town of Grayville conferred authority to pass the ordinance in question. The charter is not before us for examination; but, admitting the power, so much of it as empowered the authorities to close the saloon by force must be held invalid, for the reasons given. Authority to revoke a license to sell liquor does, on being executed, to all intents and purposes close the saloon as to that traffic, but confers no authority to deprive a man, summarily, of his property or of its use.

We are satisfied no defense to this action was set up in any of the special pleas interposed by any of these parties. The saloon should be adjudged a nuisance, before it could be abated. There must first be legal proceedings. Earp v. Lee et al., 71 Ill. 193. * * *

Finding no error in the record, the judgment is affirmed.

Judgment affirmed.[8]

[8] Part of the opinion is omitted.

See, also, Eddy v. Board of Health, 10 Phila. (Pa.) 94 (1873).

As to summary abatement, destruction, etc., under the police power, see, further, Salem v. Eastern R. Co., 98 Mass. 431, 96 Am. Dec. 650 (1868), ante, p. 150; Miller v. Horton, 152 Mass. 540, 26 N. E. 100, 10 L. R. A. 116, 23 Am. St. Rep. 850 (1891), post, p. 535; Raymond v. Fish, 51 Conn. 80, 50 Am. Rep. 3, post, p. **313**; Deems v. Baltimore, 80 Md. 164, 30 Atl. 648, 26 L. R. A. 541, 45 Am. St. Rep. 339 (1894); North American Cold Storage Co. v. Chicago, 211 U. S. 306, 29 Sup. Ct. 101, 53 L. Ed. 195 (1908), post, p. 256.

SECTION 31.—SAME—NOTICE BEFORE ABATEMENT

COOPER v. BOARD OF WORKS FOR WANDSWORTH DISTRICT.

(Court of Common Pleas, 1863. 14 C. B. [N. S.] 180.)

This was an action for pulling down a house of the plaintiff which was in the course of erection.

The defendants justified their act under the seventy-sixth section of the Metropolis Local Management Act, 1855, 18 & 19 Vict. c. 120, which enacts that, "before beginning to lay or dig out the foundation of any new house or building within any such parish or district, or to rebuild any house or building therein, and also before making any drain for the purpose of draining directly or indirectly into any sewer under the jurisdiction of the vestry or board of or for any such parish or district, seven days' notice in writing shall be given to the vestry or board by the person intending to build or rebuild such house or building or to make such drain; * * * and the vestry or district board shall make their order in relation to the matters aforesaid, and cause the same to be notified to the person from whom such notice was received, within seven days after the receipt of such notice; and, in default of such notice, or if such house, building, or drain, or branches thereto, or other connected works and apparatus and water supply, be begun, erected, made, or provided in any respect contrary to any order of the vestry or board made and notified as aforesaid, or the provisions of this act, it shall be lawful for the vestry or board to cause such house or building to be demolished or altered, and to cause such drain or branches thereto, and other connected works and apparatus, and water supply, to be re-laid, amended, or re-made, or, in the event of omission, added, as the case may require, and to recover the expenses thereof from the owner thereof in the manner hereinafter provided."

The cause was tried before Willes, J., at the sittings in Middlesex after last Michaelmas term. It appeared that the plaintiff, a builder, was employed to build a house within the Wandsworth district, and had already reached the second story, when the defendants, without giving him any notice, sent their surveyor and a number of workmen, at a late hour in the evening, and razed it to the ground.

There was conflicting evidence as to whether or not the plaintiff had given the notice, required by the seventy-sixth section of the Metropolis Local Management Act, of his intention to build; he alleging that he had, and the officers of the board denying that any such notice had come to their hands. But it was admitted by the

plaintiff that he had commenced digging out the foundations within five days of the day on which he alleged he had sent notice.

On the part of the plaintiff, it was submitted that the district board of works had no power under the circumstances to demolish his house, and that, assuming they had such power, they had improperly exercised it, by acting without notice to him or giving him an opportunity of being heard.

For the defendants it was insisted that the seventy-sixth section of the statute gave them a discretion, against the exercise of which there was no appeal, except to the metropolitan board of works under section 211, and that, inasmuch as they were acting ministerially, and not judicially, they were not bound to give any notice.

Under the direction of the learned judge, a verdict was entered for the plaintiff, leave being reserved to the defendants to move to enter the verdict for them, or a nonsuit, if the court should be of opinion that the action was not maintainable.

ERLE, C. J. I am of opinion that this rule ought to be discharged. This was an action of trespass by the plaintiff against the Wandsworth district board, for pulling down and demolishing his house; and the ground of defense that has been put forward by the defendants has been under the seventy-sixth section of the Metropolis Local Management Act, 18 & 19 Vict. c. 120. By the part of that section which applies to this case, it is enacted that, before any person shall begin to build a new house, he shall give seven days' notice to the district board of his intention to build; and it provides at the end that in default of such notice it shall be lawful for the district board to demolish the house. The district board here say that no notice was given by the plaintiff of his intention to build the house in question, wherefore they demolished it. The contention on the part of the plaintiff has been that, although the words of the statute, taken in their literal sense, without any qualification at all, would create a justification for the act which the district board has done, the powers granted by that statute are subject to a qualification which has been repeatedly recognized, that no man is to be deprived of his property without his having an opportunity of being heard. The evidence here shows that the plaintiff and the district board had not been quite on amicable terms. Be that as it may, the district board say that no notice was given, and that consequently they had a right to proceed to demolish the house without delay, and without notice to the party whose house was to be pulled down, and without giving him an opportunity of shewing any reason why the board should delay.

I think that the power which is granted by the seventy-sixth section is subject to the qualification suggested. It is a power carrying with it enormous consequences. The house in question was built only to a certain extent. But the power claimed would apply to a complete house. It would apply to a house of any value, and completed to any extent; and it seems to me to be a power which may be exercised most

perniciously, and that the limitation which we are going to put upon it is one which ought, according to the decided cases, to be put upon it, and one which is required by a due consideration for the public interest. I think the board ought to have given notice to the plaintiff, and to have allowed him to be heard. The default in sending notice to the board of the intention to build is a default which may be explained. There may be a great many excuses for the apparent default. The party may have intended to conform to the law. He may have actually conformed to all the regulations which they would wish to impose, though by accident his notice may have miscarried; and, under those circumstances, if he explained how it stood, the proceeding to demolish, merely because they had ill will against the party, is a power that the Legislature never intended to confer. I cannot conceive any harm that could happen to the district board from hearing the party before they subjected him to a loss so serious as the demolition of his house; but I can conceive a great many advantages which might arise in the way of public order, in the way of doing substantial justice, and in the way of fulfilling the purposes of the statute, by the restriction which we put upon them, that they should hear the party before they inflict upon him such a heavy loss.

I fully agree that the Legislature intended to give the district board very large powers indeed; but the qualification I speak of is one which has been recognized to the full extent. It has been said that the principle that no man shall be deprived of his property without an opportunity of being heard is limited to a judicial proceeding, and that a district board ordering a house to be pulled down cannot be said to be doing a judicial act. I do not quite agree with that; neither do I undertake to rest my judgment solely upon the ground that the district board is a court exercising judicial discretion upon the point; but the law, I think, has been applied to many exercises of power which in common understanding would not be at all more a judicial proceeding than would be the act of the district board in ordering a house to be pulled down. The case of the corporation of the University of Cambridge, who turned out Dr. Bentley, in the exercise of their assumed power of depriving a member of the University of his rights, and a number of other cases which are collected in the Hammersmith Rent-Charge Case, 4 Exch. 96, in the judgment of Parke, B., show that the principle has been very widely applied. The district board must do the thing legally; there must be a resolution; and, if there be a board, and a resolution of that board, I have not heard a word to show that it would not be salutary that they should hear the man who is to suffer from their judgment before they proceed to make the order under which they attempt to justify their act.

It is said that an appeal from the district board to the metropolitan board (under section 211) would be the mode of redress. But, if the district board have the power to do what is here stated, I am not at all clear that there would be a right of redress in that way. The met-

ropolitan board may not have a right to give redress for that which was done under the provisions of the statute. I think the appeal clause would evidently indicate that many exercises of the power of a district board would be in the nature of judicial proceedings, because, certainly when they are appealed from, the appellant and the respondent are to be heard as parties, and the matter is to be decided at least according to judicial forms. I take that to be a principle of very wide application, and applicable to the present case; and I think this board was not justified under the statute, because they have not qualified themselves for the exercise of their power by hearing the party to be affected by their decision.

WILLES, J.[9] I am of the same opinion. * * * There is another remark to be made with reference to these parties' proceedings. The board are not only to do the work of demolishing the house, if they think proper, or modifying it, but they are to charge the expenses on the person who has erred against the act. His property is affected and his purse is further affected. What happens upon that? and how is the money to be got? That is a proceeding under the 225th section, which is a section giving jurisdiction to the justices before whom the costs are to be ascertained and recovered; and it is clear that under that section the justices could not proceed without having before them the person against whom the expenses are to be adjudged. And it does seem an absurdity to say that in determining the amount of expenses the party shall be heard, but that in determining whether proceedings should be taken his mouth should be closed. I cannot help thinking that a board exercising this large power should follow the ordinary rule, that the party sought to be affected should be heard; and I think that the verdict for the plaintiff ought to stand.

BYLES, J. I am of the same opinion. This is a case in which the Wandsworth district board have taken upon themselves to pull down a house, and to saddle the owner with the expenses of demolition, without notice of any sort. There are two sorts of notice which may possibly be required, and neither of them has been given—one, a notice of a hearing, that the party may be heard if he has anything to say against the demolition; the other is a notice of the order, that he may consider whether he can mitigate the wrath of the board, or in any way modify the execution of the order. Here they have given him neither opportunity. It seems to me that that board are wrong, whether they acted judicially or ministerially. I conceive they acted judicially, because they had to determine the offense, and they had to apportion the punishment as well as the remedy. This being so, a long course of decisions, beginning with Dr. Bentley's Case, Rex v. Chancellor, etc., of Cambridge, 1 St. 557, 2 Ld. Raym. 1334, 8 Mod. 148, Fortescue, 202, and ending with some very recent cases, establish that, although there are no positive words in a statute requiring

[9] Only a portion of the opinions of Willes and Byles, JJ., are printed.

that the party shall be heard, yet the justice of the common law will supply the omission of the Legislature. * * *

Rule discharged.[10]

NORTH AMERICAN COLD STORAGE CO. v. CITY OF CHICAGO.

(Supreme Court of United States, 1908. 211 U. S. 306, 29 Sup. Ct. 101, 53 L. Ed. 195.)

The case involved the question of the validity of section 1161 of the Revised Municipal Code of the City of Chicago for 1905, which reads as follows:

"Every person being the owner, lessee, or occupant of any room, stall, freight house, cold storage house, or other place, other than a private dwelling, where any meat, fish, poultry, game, vegetables, fruit, or other perishable article adapted or designed to be used for human food shall be stored or kept, whether temporarily or otherwise, and every person having charge of, or being interested or engaged, whether as principal or agent, in the care of or in respect to the custody or sale of any such article of food supply, shall put, preserve, and keep such article of food supply in a clean and wholesome condition, and shall not allow the same, nor any part thereof, to become putrid, decayed, poisoned, infected, or in any other manner rendered or made unsafe or unwholesome for human food; and it shall be the duty of the meat and food inspectors and other duly authorized employés of the health department of the city to enter any and all such premises above specified at any time of any day, and to forthwith seize, condemn, and destroy any such putrid, decayed, poisoned, and infected food, which any such inspector may find in and upon said premises." * * *

PECKHAM, J.[11] * * * Complainant, however, contends that there was no emergency requiring speedy action for the destruction of the poultry in order to protect the public health from danger resulting from consumption of such poultry. It is said that the food was in cold storage, and that it would continue in the same condition it then was for three months, if properly stored, and that therefore the defendants had ample time in which to give notice to complainant or the owner and have a hearing of the question as to the condition of the poultry; and, as the ordinance provided for no hearing, it was void. But we think this is not required. The power of the Legislature to enact laws in relation to the public health being conceded, as it must be, it is to a great extent within legislative discretion as to whether any hearing need be given before the destruction of unwholesome food which is unfit for human consumption. If a hearing were to be always

[10] Approved by Court of Appeal, Hopkins v. Smethwick Local Board of Health, 24 Q. B. D. 712 (1890).

[11] Only a portion of the opinion of Peckham, J., is printed.

necessary, even under the circumstances of this case, the question at once arises as to what is to be done with the food in the meantime. Is it to remain with the cold storage company, and, if so, under what security that it will not be removed? To be sure that it will not be removed during the time necessary for the hearing, which might frequently be indefinitely prolonged, some guard would probably have to be placed over the subject-matter of investigation, which would involve expense, and might not even then prove effectual. What is the emergency which would render a hearing unnecessary?

We think when the question is one regarding the destruction of food which is not fit for human use the emergency must be one which would fairly appeal to the reasonable discretion of the Legislature as to the necessity for a prior hearing, and in that case its decision would not be a subject for review by the courts. As the owner of the food or its custodian is amply protected against the party seizing the food, who must, in a subsequent action against him, show as a fact that it was within the statute, we think that due process of law is not denied the owner or custodian by the destruction of the food alleged to be unwholesome and unfit for human food without a preliminary hearing. The cases cited by the complainant do not run counter to those we have above referred to.

Even if it be a fact that some value may remain for certain purposes in food that is unfit for human consumption, the right to destroy it is not, on that account, taken away. The small value that might remain in said food is a mere incident, and furnishes no defense to its destruction when it is plainly kept to be sold at some time as food. California Reduction Co. v. Sanitary Reduction Works, 199 U. S. 306–322, 26 Sup. Ct. 100, 50 L. Ed. 204–211; Gardner v. Michigan, 199 U. S. 325, 331, 26 Sup. Ct. 106, 50 L. Ed. 212, 216.

The decree of the court below is modified by striking out the ground for dismissal of the bill as being for want of jurisdiction, and, as modified, is affirmed.[12]

Mr. Justice BREWER dissents.

[12] See Pruden v. Love, 67 Ga. 190 (1881), notice required by statute.

Notice in execution of tax distress warrants, see Cooley, Taxation, pp. 441–443.

As to summary action against persons, see Haverty v. Bass, 66 Me. 71 (1876), quarantine; Lovell v. Seeback, 45 Minn. 465, 48 N. W. 23, 11 L. R. A. 667 (1891), removal of paupers; also 19 Opinions Attys. Gen. 706 (1890).

Collection of taxes by seizure of person, see **Palmer v. McMahon, 133 U. S. 660, 10 Sup. Ct. 324, 33 L. Ed. 772 (1890).**

SECTION 32.—FORFEITURE BY ADMINISTRATIVE PROCESS

WILCOX v. HEMMING.

(Supreme Court of Wisconsin, 1883. 58 Wis. 144, 15 N. W. 435, 46 Am. Rep. 625.)

ORTON, J.[13] This is an action of replevin, without claim of delivery, for three horses, the property of the plaintiff, taken and detained by the defendant. The defendant justifies such taking and detention by virtue of his being master or keeper of the public pound of the city of Janesville, and having authority and right under the charter and ordinances of said city to receive and detain said horses in such pound, and to sell the same, on account of their having been permitted by the plaintiff as such owner to run or be at large in one of the streets of said city in violation of such ordinances.

Some questions are raised on the evidence and charge of the court to the jury, which will be first disposed of before the consideration of the important and principal question in the case, viz., the constitutionality of the ordinance in question by which the defendant claims justification, for the taking and detention of the property. * * *

5. The main and important objection to the justification of the defendant under pretended legal authority is that the ordinance under which he received, held, and sold the horses of the plaintiff is unconstitutional, as authorizing the forfeiture, condemnation, or confiscation of property without due process of law, and without compensation, etc. It is contended that before the property is sold there should be provision for an adjudication in court of the facts which would make such property liable to be thus taken and sold. What disposition is to be made by the terms of the ordinance of the proceeds of such sale is unimportant in determining the constitutionality of those provisions which authorize the restraint and sale of such property. The mischief complained of ends with the sale, for the property of the owner in such animals is thereby taken away, and it would not cure the mischief and scarcely mitigate the wrong to offer the owner the remnant of the proceeds of the sale after deducting the expenses of keeping and sale, and the fine incurred, or even the proceeds without any such deduction.

The provisions of the charter of the city above cited fully authorize the receiving, keeping, and sale of such animals running at large in the public streets, and the passing of an ordinance to carry such provision into execution, so that the act of the Legislature is amenable to this objection of unconstitutionality, as well as the ordinance itself.

[13] Only a portion of the opinion of Orton, J., is printed.

The provisions of the charter above referred to are that such animals may be "impounded and sold to discharge the penalty for the violation of the ordinance, and the expenses of impounding and sale." Here is found the authority for prescribing a fine for such offense, as well as the impounding and sale. The right of such legislation can be found and justified only by that police power of the state to provide summary and suitable methods and proceedings to protect the public health, peace, and tranquility, and the use of the highway, which transcends private rights and the constitutional provisions for their protection.

[The opinion here cites and quotes from the following cases: Com. v. Alger, 7 Cush. (Mass.) 85; Pettit v. May, 34 Wis. 666; Miles v. Chamberlain, 17 Wis. 446; Rockwell v. Nearing, 35 N. Y. 302; Roberts v. Ogle, 30 Ill. 459, 83 Am. Dec. 201; Clark v. Lewis, 35 Ill. 417; Case v. Hall, 21 Ill. 632; Friday v. Floyd, 63 Ill. 50; Kennedy v. Sowden, 1 McMul. (S. C.) 323; Crosby v. Warren, 1 Rich. Law (S. C.) 385; Shaw v. Kennedy, 4 N. C. 591; Hellen v. Noe, 25 N. C. 495; Whitfield v. Longest, 28 N. C. 268; Spitler v. Young, 63 Mo. 42; Gilchrist v. Schmidling, 12 Kan. 263; White v. Tallman, 26 N. J. Law, 67; Varden v. Mount, 78 Ky. 86, 39 Am. Rep. 208; Cotter v. Doty, 5 Ohio, 393; McKee v. McKee, 8 B. Mon. (Ky.) 433; Hart v. Mayor of Albany, 9 Wend. (N. Y.) 571, 24 Am. Dec. 165.]

There are many other cases which might be cited to sustain this power given in the charter to the common council to make ordinances to restrain animals from running at large in the public streets, and to impound and sell them to pay the expenses, etc. So far the ordinance itself has not been examined. There are some decisions, it must be admitted, which hold that such legislation, as well as ordinances under it, are void as being in conflict with the constitutional provisions for the protection of property; but it is observable that in such cases this police power, the exercise of which in a summary manner is absolutely necessary for the protection of the public in the use of its highways, is scarcely alluded to. The question is of great importance, and one not without difficulty. To seize and sell, upon necessarily short notice, animals of great value, because permitted by the owner to run at large in the street, without an adjudication of the offense in the courts, appears to be a harsh remedy. But how this summary mode of proceeding can be avoided, without surrendering the whole police power to protect the highways from such an encroachment, which destroys their use by the public for the time being, we fail to perceive. The owner will not restrain his own animals from running upon the streets. The city authorities must do so, and at once. Then such animals must be fed and cared for and kept until the owner shall pay the expenses and take them away. If he fails or refuses to do so, they must be sold. But we have already taken this view of the case, and will proceed no further with the argument in this opinion, already too long.

The first section of the ordinance prohibits cattle, horses, etc., from running or being at large in any street, highway, etc. The second sec-

tion provides a forfeiture and fine of one dollar against the owner of the animal. The third authorizes any person so finding animals running at large to drive them to the pound, and allows 25 cents for such service for each animal. The fourth makes it the duty of the pound-master to receive them, to pay such 25 cents to the person driving them, and to provide suitable sustenance for the animals in the pound, and allows the pound-master his costs and charges, and 50 per cent. additional to the costs. The fifth authorizes the owner to take them away on payment of the fine and charges. The sixth provides for notice of two days, to be once published in a daily or weekly newspaper, and posted at three public places in the city, of the sale to be made, after six days from the impounding, at public vendue at the pound, provided they are not released by the owner taking them away, "or [they are] taken thereout by proceedings at law." For want of bidders the sale may be adjourned by proclamation at the time, or, if they will not sell for sufficient to pay the charges and expenses, it may be again adjourned. The seventh section provides for the disposition of the proceeds of sale as follows: The pound-keeper deducts therefrom his charges of subsistence, money paid for driving, expenses of sale, and "one-half of the penalty," and the balance thereof shall be paid to the treasurer of the city. These are all of the provisions which need be noticed as being material to the main question. These regulations would seem to be reasonable and proper to effect the object sought, and are really necessary to protect the public, and, so far as possible, the rights of the owner. There is nothing in the evidence itself or the charter which forfeits or confiscates the proceeds of the sale of the property beyond the payment of the legal charges thereon. The overplus belongs to the owner, and he may obtain it at any time he chooses to do so. It cannot be presumed that it is placed in the city treasury as belonging to the city, but only for safe-keeping.

It will be observed that, according to the sixth section, the owner may, at any time before the sale, take the animals away by proceedings at law, which would include the action of replevin, an action which would not lie at common law against a pound-keeper, and try in court the question of their liability to be impounded; and there is ample notice of the sale elsewhere provided, so that, although no adjudication is provided before restraint and impounding, the owner's day in court upon the question of his liability to pay the fine, and the animal's liability to be restrained, are not lost or foreclosed.

There is one provision of the ordinance, however, which cannot be sustained, and that is that the pound-keeper may deduct the fine of one dollar imposed, out of the proceeds of the sale, or exact such fine before surrendering the property before sale. This is made a fine and forfeiture, and it must be enforced by action in court, as well as other fines and forfeitures under the general statute, or under sections 11 and 12 of the charter, which provides for their collection. The adjudication of this matter cannot be taken away, for it is the punishment of the

owner for permitting his animals to go at large on the streets in violation of the charter and of the ordinance. But this is a very insignificant and unimportant part of the ordinance and of the provision of the charter. This is a matter in personam and a personal liability, and as punishment in some measure for the violation of the ordinance, to deter him and others from like offending, and is distinct from the main provisions of the ordinance in accordance with which the animals themselves are cared for and disposed of after removing them from the streets. We cannot think that the matter of the fine was deemed important by the Legislature to the validity of the other main provisions, or that such provisions would not have been adopted if the fine had been omitted as a deduction from the proceeds of the sale and as a charge upon the property. To that extent only the charter relating to the subject and the ordinance thereunder should be held void for unconstitutionality.

In Gosselink v. Campbell, 4 Iowa, 296, the general ordinance and the charter were very similar to this in every respect, including the fine, and the court held the general ordinance valid, and that part relating to the deduction of the fine from the proceeds of the sale as a charge upon the property as invalid; and we adopt the language of that court, so well considered and especially appropriate, and as expressing a correct rule of constitutional law in such cases: "Proceedings for the abatement of the nuisance are of a more summary nature than actions, from the necessity of the case. The ordinance does not, strictly speaking, create a forfeiture; for, after paying the expenses and fine, the remainder of the proceeds of sale are paid to the owner. It is then, in effect, but the abatement of the nuisance, and as such is regular. It is sufficient for the abatement of the nuisance and the payment of the charges, but not for the enforcement of the fine."

In Willis v. Legris, 45 Ill. 289, the ordinance placed the fine for the violation of the ordinance with the charges and expenses of impounding and sale, and the court said: "This provision is void as contravening that constitutional right every man has to an investigation in court when charged with an offense punishable by fine. * * * The city marshal had no right to detain the horses for the reason the penalty was not paid."

We hold, therefore, that the provisions of the charter authorizing the ordinance to restrain, impound, and sell animals running at large in the streets, and the ordinance itself, so far as they relate to the taking up, impounding, and selling such animals, are valid, and that part of both the charter and the ordinance making the fine of one dollar a charge upon the property, to be paid by the owner before he can take them away, and to be deducted from the proceeds of the sale, void.

It may be said incidentally, before closing this subject, that such legislation and municipal regulations providing for summary proceedings without trial, for the abatement of nuisances of a public character, involving the destruction or forfeiture of things inanimate, are not as

well supported by necessity or emergency as those involving the keeping, impounding, and selling of animals requiring immediate and constant care, subsistence, and expense, and in respect to which long delay is inadmissible. Cases are numerous of the former class, in which summary proceedings, without ordinary trial for abatement, have been allowed, without a thought of any infringement of a constitutional right. * * *

The judgment of the circuit court is affirmed.[14]

LAWTON et al. v. STEELE.

(Supreme Court of United States, 1894. 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385.)

In Error to the Supreme Court of the State of New York.

This was an action at law instituted in the Supreme Court for the county of Jefferson, by the plaintiffs in error against the defendant in error, together with Edward L. Sargent and Richard U. Sherman, for the conversion of 15 hoop and fyke nets, of the alleged value of $525. Defendants Steele and Sargent interposed a general denial. Defendant Sherman pleaded that he, with three others, constituted the commissioners of fisheries of the state of New York, with power to give directions to game and fish protectors with regard to the enforcement of the game law; that defendant Steele was a game and fish protector duly appointed by the Governor of the state of New York; and that the nets sued for were taken possession of by said Steele, as such game and fish protector, upon the ground that they were maintained upon the waters of the state in violation of existing statutes for the protection of fish and game, and thereby became a public nuisance.

The facts were undisputed. The nets were the property of the plaintiffs, and were taken away by the defendant Steele, and destroyed. At

[14] Compare Greer v. Downey, 8 Ariz. 164, 71 Pac. 900, 61 L. R. A. 408 (1903), case of a private claim.

"It remains only to consider the contention that the provision of the statute commanding the destruction of teas not exported within six months after their final rejection was unconstitutional. The importer was charged with notice of the provisions of the law, and the conditions upon which teas might be brought from abroad, with a view to their introduction into the United States for consumption. Failing to establish the right to import, because of the inferior quality of the merchandise as compared with the standard, the duty was imposed upon the importer to perform certain requirements, and to take the goods from the custody of the authorities within a period of time fixed by the statute, which was ample in duration. He was notified of the happening of the various contingencies requiring positive action on his part. The duty to take such action was enjoined upon him, and if he failed to exercise it the collector was under the obligation after the expiration of the time limit to destroy the goods. That plaintiff in error had knowledge of the various steps taken with respect to the tea, including the final rejection by the board of general appraisers, is conceded. We think the provision of the statute complained of was not wanting in due process of law." Buttfield v. Stranahan, 192 U. S. 470, 497, 24 Sup. Ct. 349, 356, 48 L. Ed. 525 (1904).

the time of the taking, most of the nets were in the waters of the Black River Bay, being used for fishing purposes, and the residue were upon the shore of that bay, having recently been used for the same purpose. The plaintiffs were fishermen, and the defendant Steele was a state game and fish protector. The taking and destruction of the nets were claimed to have been justifiable under the statutes of the state relating to the protection of game and fish. Plaintiffs claimed there was no justification under the statutes, and, if they constituted such justification upon their face, they were unconstitutional. Defendant Sherman was a state fish commissioner. Defendant Sargent was president of the Jefferson County Fish & Game Association. Plaintiffs claimed these defendants to be liable upon the ground that they instigated, incited, or directed the taking and destruction of the nets.

Upon trial before a jury a verdict was rendered, subject to the opinion of the court, in favor of the plaintiffs against defendant Steele for the sum of $216, and in favor of defendants Sargent and Sherman. A motion for a new trial was denied, and judgment entered upon the verdict for $216 damages and $166.09 costs. On appeal to the General Term this judgment was reversed, and a new trial ordered, and a further appeal allowed to the Court of Appeals. On appeal to the Court of Appeals the order of the General Term granting a new trial was affirmed, and judgment absolute ordered for the defendant. 119 N. Y. 226, 23 N. E. 878, 7 L. R. A. 134, 16 Am. St. Rep. 813. Plaintiffs thereupon sued out a writ of error from this court.

Mr. Justice BROWN,[15] after stating the facts in the foregoing language, delivered the opinion of the court.

This case involves the constitutionality of an act of the Legislature of the state of New York known as chapter 591, Laws N. Y. 1880, as amended by chapter 317, Laws N. Y. 1883, entitled "An act for the appointment of game and fish protectors." * * *

By the act of 1880, as amended by the act of 1883:

"Sec. 2. Any net, pound, or other means or device for taking or capturing fish, or whereby they may be taken or captured, set, put, floated, had, found, or maintained in or upon any of the waters of this state, or upon the shores of or islands in any of the waters of this state, in violation of any existing or hereafter enacted statutes or laws for the protection of fish, is hereby declared to be and is a public nuisance, and may be abated and summarily destroyed by any person, and it shall be the duty of each and every protector aforesaid and of every game constable to seize and remove and forthwith destroy the same, * * * and no action for damages shall lie or be maintained against any person for or on account of any such seizure and destruction."

This last section was alleged to be unconstitutional and void for three reasons: (1) As depriving the citizen of his property without due process of law; (2) as being in restraint of the liberty of the

[15] Only a portion of the opinion of Brown, J., is printed.

citizen; (3) as being an interference with the admiralty and maritime jurisdiction of the United States.

The trial court ruled the first of the above propositions in plaintiffs' favor, and the others against them, and judgment was thereupon entered in favor of the plaintiffs.

The constitutionality of the section in question was, however, sustained by the General Term and by the Court of Appeals, upon the ground of its being a lawful exercise of the police power of the state. * * *

The main, and only real, difficulty connected with the act in question, is in its declaration that any net, etc., maintained in violation of any law for the protection of fisheries is to be treated as a public nuisance, "and may be abated and summarily destroyed by any person; and it shall be the duty of each and every protector aforesaid and every game constable, to seize, remove, and forthwith destroy the same." The Legislature, however, undoubtedly possessed the power, not only to prohibit fishing by nets in these waters, but to make it a criminal offense, and to take such measures as were reasonable and necessary to prevent such offenses in the future. It certainly could not do this more effectually than by destroying the means of the offense. If the nets were being used in a manner detrimental to the interests of the public, we think it was within the power of the Legislature to declare them to be nuisances, and to authorize the officers of the state to abate them. Hart v. Mayor, 9 Wend. (N. Y.) 571, 24 Am. Dec. 165; Meeker v. Van Rensselaer, 15 Wend. (N. Y.) 397. An act of the Legislature which has for its object the preservation of the public interests against the illegal depredations of private individuals ought to be sustained, unless it is plainly violative of the constitution or subversive of private rights. In this case there can be no doubt of the right of the Legislature to authorize judicial proceedings to be taken for the condemnation of the nets in question, and their sale or destruction by process of law. Congress has assumed this power in a large number of cases, by authorizing the condemnation of property which has been made use of for the purpose of defrauding the revenue. Examples of this are vessels illegally registered or owned, or employed in smuggling or other illegal traffic; distilleries or breweries illegally carried on or operated; and buildings standing upon or near the boundary line between the United States and another country, and used as depots for smuggling goods. In all these cases, however, the forfeiture was decreed by judicial proceeding. But where the property is of little value, and its use for the illegal purpose is clear, the Legislature may declare it to be a nuisance, and subject to summary abatement. Instances of this are the power to kill diseased cattle; to pull down houses in the path of conflagrations; the destruction of decayed fruit or fish or unwholesome meats, of infected clothing, obscene books or pictures, or instruments which can only be used for illegal purposes. While the Legislature has no right ar-

bitrarily to declare that to be a nuisance which is clearly not so, a good deal must be left to its discretion in that regard; and, if the object to be accomplished is conducive to the public interests, it may exercise a large liberty of choice in the means employed. Railway Co. v. Hunt, 50 N. J. Law, 308, 12 Atl. 697; Blazier v. Miller, 10 Hun, 435; Mouse's Case, 12 Coke, 63; Stone v. Mayor, 25 Wend. (N. Y.) 173; Print Works v. Lawrence, 21 N. J. Law, 248; Id., 23 N. J. Law, 590, 57 Am. Dec. 420.

It is not easy to draw the line between cases where property illegally used may be destroyed summarily and where judicial proceedings are necessary for its condemnation. If the property were of great value, as, for instance, if it were a vessel employed for smuggling or other illegal purposes, it would be putting a dangerous power in the hands of a custom officer to permit him to sell or destroy it as a public nuisance, and the owner would have good reason to complain of such act as depriving him of his property without due process of law. But where the property is of trifling value, and its destruction is necessary to effect the object of a certain statute, we think it is within the power of the Legislature to order its summary abatement. For instance, if the Legislature should prohibit the killing of fish by explosive shells, and should order the cartridges so used to be destroyed, it would seem like belittling the dignity of the judiciary to require such destruction to be preceded by a solemn condemnation in a court of justice. The same remark might be made of the cards, chips, and dice of a gambling room.

The value of the nets in question was but $15 apiece. The cost of condemning one (and the use of one is as illegal as the use of a dozen) by judicial proceedings would largely exceed the value of the net, and doubtless the state would, in many cases, be deterred from executing the law by the expense. They could only be removed from the water with difficulty, and were liable to injury in the process of removal. The object of the law is undoubtedly a beneficent one, and the state ought not to be hampered in its enforcement by the application of constitutional provisions which are intended for the protection of substantial rights of property. It is evident that the efficacy of this statute would be very seriously impaired by requiring every net illegally used to be carefully taken from the water, carried before a court or magistrate, notice of the seizure to be given by publication, and regular judicial proceedings to be instituted for its condemnation.

There is not a state in the Union which has not a constitutional provision entitling persons charged with crime to a trial by jury, and yet from time immemorial the practice has been to try persons charged with petty offenses before a police magistrate, who not only passes upon the question of guilt, but metes out the proper punishment. This has never been treated as an infraction of the Constitution, though technically a person may in this way be deprived of his liberty without the intervention of a jury. Callan v. Wilson, 127 U. S. 540, 8 Sup.

Ct. 1301, 32 L. Ed. 223, and cases cited. So, the summary abatement of nuisances without judicial process or proceeding was well known to the common law long prior to the adoption of the constitution, and it has never been supposed that the constitutional provision in question in this case was intended to interfere with the established principles in that regard.

Nor is a person whose property is seized under the act in question without his legal remedy. If, in fact, his property has been used in violation of the act, he has no just reason to complain; if not, he may replevy his nets from the officer seizing them, or, if they have been destroyed, may have his action for their value. In such cases the burden would be upon the defendant to prove a justification under the statute. As was said by the Supreme Court of New Jersey in a similar case (Print Works v. Lawrence, 21 N. J. Law, 248, 259): "The party is not, in point of fact, deprived of a trial by jury. The evidence necessary to sustain the defense is changed. Even if the party were deprived of a trial by jury, the statute is not, therefore, necessarily unconstitutional." Indeed, it is scarcely possible that any actual injustice could be done in the practical administration of the act.

It is said, however, that the nets are not in themselves a nuisance, but are perfectly lawful acts of manufacture, and are ordinarily used for a lawful purpose. This is, however, by no means a conclusive answer. Many articles—such, for instance, as cards, dice, and other articles used for gambling purposes—are perfectly harmless in themselves, but may become nuisances by being put to an illegal use, and in such cases fall within the ban of the law, and may be summarily destroyed. It is true that this rule does not always follow from the illegal use of a harmless article. A house may not be torn down because it is put to an illegal use, since it may be as readily used for a lawful purpose (Ely v. Supervisors, 36 N. Y. 297); but, where minor articles of personal property are devoted to such use, the fact that they may be used for a lawful purpose would not deprive the Legislature of the power to destroy them. The power of the Legislature to declare that which is perfectly innocent in itself to be unlawful is beyond question (People v. West, 106 N. Y. 293, 12 N. E. 610, 60 Am. Rep. 452); and in such case the Legislature may annex to the prohibited act all the incidents of a criminal offense, including the destruction of property denounced by it as a public nuisance.

In Weller v. Snover, 42 N. J. Law, 341, it was held that a fish warden for a county, appointed by the governor, had the right, under an act of the Legislature, to enter upon land and destroy a fish basket constructed in violation of the statute, together with the materials of which it was composed, so that it might not again be used. It was stated in that case that, "after a statute has declared an invasion of a public right to be a nuisance, it may be abated by the destruction of the object used to effect it. The person who, with actual or construc-

tive notice of the law, sets up such nuisance, cannot sue the officer whose duty it has been made, by the statute, to execute its provisions." So, in Williams v. Blackwall, 2 Hurl. & C. 33, the right to take possession of or destroy any engine placed or used for catching salmon in contravention of law was held to extend to all persons, and was not limited to conservators or officers appointed under the act.

It is true there are several cases of a contrary purport. Some of these cases, however, may be explained upon the ground that the property seized was of considerable value. Ieck v. Anderson, 57 Cal. 251, 40 Am. Rep. 115, boats as well as nets; Dunn v. Burleigh, 62 Me. 24, teams and supplies in lumbering; King v. Hayes, 80 Me. 206, 13 Atl. 882, a horse. In others the court seems to have taken a more technical view of the law than the necessities of the case or an adequate protection of the owner required. Lowry v. Rainwater, 70 Mo. 152, 35 Am. Rep. 420; State v. Robbins, 124 Ind. 308, 24 N. E. 978, 8 L. R. A. 438; Ridgeway v. West, 60 Ind. 371.[16]

Upon the whole, we agree with the Court of Appeals in holding this act to be constitutional, and the judgment of the Supreme Court is therefore affirmed.

Mr. Chief Justice FULLER (dissenting). In my opinion the legislation in question, so far as it authorizes the summary destruction of fishing nets and prohibits any action for damages on account of such destruction, is unconstitutional.

Fishing nets are in themselves articles of property entitled to the protection of the law, and I am unwilling to concede to the Legislature of a state the power to declare them public nuisances, even when put to use in a manner forbidden by statute, and on that ground to justify their abatement by seizure and destruction without process, notice, or the observance of any judicial form.

The police power rests upon necessity and the right of self-protection, but private property cannot be arbitrarily invaded under the mere guise of police regulation, nor forfeited for the alleged violation of law by its owner, nor destroyed by way of penalty inflicted upon him, without opportunity to be heard.

It is not doubted that the abatement of a nuisance must be limited to the necessity of the occasion, and, as the illegal use of fishing nets would be terminated by their withdrawal from the water and the public be fully protected by their detention, the lack of necessity for the arbitrary proceedings prescribed seems to me too obvious to be ignored. Nor do I perceive that the difficulty which may attend their removal, the liability to injury in the process, and their comparatively small value ordinarily, affect the principle, or tend to show their summary destruction to be reasonably essential to the suppression of the illegal use. Indeed, I think that that argument is to be deprecated

[16] See, also, Edson v. Crangle, 62 Ohio St. 49, 56 N. E. 647 (1900); Dunn v. Burleigh, 62 Me. 24 (1873).

as weakening the importance of the preservation, without impairment in ever so slight a degree, of constitutional guaranties.

I am, therefore, constrained to withhold my assent to the judgment just announced, and am authorized to say that Mr. Justice FIELD and Mr. Justice BREWER concur in this dissent.[17]

[17] Compare Colon v. Lisk, 153 N. Y. 188, 47 N. E. 302, 60 Am. St. Rep. 609 (1897).

See, also, Fisher v. McGirr, 1 Gray (Mass.) 1, 61 Am. Dec. 381 (1854); Lincoln v. Smith, 27 Vt. 328 (1855); Bridge Street, etc., Co. v. Hogadone, 150 Mich. 638, 114 N. W. 917 (1908); Freund, Police Powers, §§ 525–527.

PART II

RELIEF AGAINST ADMINISTRATIVE ACTION

CHAPTER VII

ACTIONS TO RECOVER DAMAGES OR MONEY

SECTION 33.—AGAINST OFFICERS—JUDGES

LANGE v. BENEDICT.

(Court of Appeals of New York, 1878. 73 N. Y. 12, 29 Am. Rep. 80.)

FOLGER, J.[1] The plaintiff has brought an action against the defendant for false imprisonment, and detention in prison. He alleges that it was wrongful and willful, without just cause or provocation. He does not allege that it was malicious or corrupt. The complaint in the action sets out the facts in extenso upon which the plaintiff relies. To this the defendant has demurred, stating three causes of demurrer; but the one cause relied upon is that the complaint does not state facts sufficient to constitute a cause of action.

It is well, therefore, to state with some particularity the facts which are alleged, or are conceded. In October, 1873, the defendant was judge of the District Court for the United States of the Eastern District of New York. As such, by virtue of an act of Congress, he presided at and held the Circuit Court of the United States for the Southern District of New York for the October term of that year. The plaintiff was at that term arraigned upon an indictment of twelve counts, the general purport of which was that he had stolen, embezzled, or appropriated to his own use, certain mail-bags, the property of the United States, of the value of twenty-five dollars. He was tried upon the indictment. The verdict of the jury was, generally, that the plaintiff was guilty, and that the value of the mail-bags was less than twenty-five dollars. He was indicted under an act of Congress, which declared the offense and affixed the punishment. By that act, if the value of the mail-bags taken was found to be less than twenty-five dollars, the punishment for the offense was a fine of $200 or im-

[1] Only a portion of this case is printed.

prisonment for one year. The defendant, sitting as such judge and holding that court at that term, passed judgment upon the plaintiff, and sentenced him to pay a fine of $200, and to be imprisoned for one year. It is manifest that the punishment thus imposed was more than that affixed to the offense by the act of Congress. The plaintiff paid to the clerk of the United States Circuit Court, intending it in full payment of the fine so imposed, the sum of $200. This was done on the 4th day of November, 1873, and during the same term of the court; and the clerk made certificate that that sum was then on deposit in the registry of that court. The clerk paid the money into the office of the Assistant Treasurer of the United States, in New York City, in that circuit, to the credit of the Treasurer of the United States, as the fine thus imposed. There is no direct allegation in the complaint that the plaintiff was imprisoned under that sentence. There is an allegation that during the same term of that court a writ of habeas corpus was granted and returned into that court, in which the imprisonment of the plaintiff was made to appear. It may be taken as conceded, however, that the plaintiff was actually in prison for the space of five days after the pronouncing of that sentence, and before further proceedings were had. At the same term of that court, the defendant sitting and holding that court, and as the judge thereof, on the return of that writ vacated and set aside the sentence above set forth, and at the same time, and as a part of the same judicial act and order, passed judgment anew upon the plaintiff, and resentenced him to be imprisoned for the term of one year. Under this action of the defendant the plaintiff was imprisoned, which is the alleged wrongful imprisonment and detention of him by the defendant.

Judicial proceedings were afterwards had in behalf of the plaintiff, the end of which was that the Supreme Court of the United States adjudged the resentence, above stated to have been pronounced, without authority, and discharged the plaintiff from his imprisonment. It does not appear that the defendant was a party to the proceedings in the Supreme Court, or was heard or represented there. On this state of facts the plaintiff insists that the defendant is liable to him in damages. The defendant claims that the facts show that all which he did he did as a United States judge, and that the judicial character in which he acted protects him from personal responsibility.

In our judgment, the question between the parties is brought to what, in words at least, is a very narrow issue: Did the defendant impose the second sentence as a judge; or, although he was at the moment of right upon the bench, and authorized and empowered to exercise the functions of a judge, was the act of resentencing the plaintiff so entirely without jurisdiction, or so beyond or in excess of the jurisdiction which he then had as a judge, as that it was an arbitrary and unlawful act of a private person? A narrow issue, but not to be easily determined to the satisfaction of a cautious inquirer. * * *

The general rule which applies to all such cases, and which is to be

observed in this, has been in olden times stated thus: Such as are by law made judges of another shall not be criminally accused, or made liable to an action for what they do as judges; to which the Year Books (43 Edw. III, 9; 9 Edw. IV, 3) are cited in Floyd v. Barker, 12 Coke, 26. The converse statement of it is also ancient: Where there is no jurisdiction at all, there is no judge. The proceeding is as nothing. Perkin v. Proctor, 2 Wilson, 382–384, citing the Marshalsea Case, 10 Coke, 65–76, which says: "Where he has no jurisdiction, non est judex." It has been stated thus, also: No action will lie against a judge, acting in a judicial capacity, for any errors which he may commit, in a matter within his jurisdiction. Gwynne v. Pool, Lutw. 290. It has been, in modern days carried somewhat further, in the terms of the statement: Judges of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously and corruptly. Bradley v. Fisher, 13 Wall. 351, 20 L. Ed. 646.

It is to be seen that in these different modes of stating the principle there abides a qualification. To be free from liability for the act, it must have been done as judge, in his judicial capacity. It must have been a judicial act. So it always remains to be determined, when is an act done as judge, in a judicial capacity? And this is the difficulty which has most often been found in the use of this rule, and which is present here: To determine when the facts exist which call into play that qualification.

For it is plain that the fact that a man sits in the seat of justice, though having a clear right to sit there, will not protect him in every act which he may choose or chance to do there. Should such an one, rightfully holding a court for the trial of civil actions, order the head of a bystander to be stricken off, and be obeyed, he would be liable. Thus, a person in the office of judge of the ecclesiastical court in England excommunicated one for refusing to obey an order, made by him, that he become guardian ad litem for an infant son, and though the order was made in a matter then lawfully before the court for adjudication, and of which he as judge had jurisdiction, he was held liable to an action. Beaurain v. Sir Wm. Scott, 3 Campb. 388. He had not, as judge, jurisdiction of the person to whom he addressed the order. On the other hand, one rightfully holding a court for the trial of a criminal action fined and imprisoned a juror, for that he did not bring in a verdict of guilty against one on trial for an offense, after the court had directed the jury that such a verdict was according to the law and facts. The juror was discharged from imprisonment on habeas corpus brought in his behalf, and it was held that the act of fining and imprisoning him was unlawful, inasmuch as there was no allegation of corruption or like bad conduct against the juror. The juror then brought action against him who sat as judge and made the order for the fine and imprisonment, but took nothing thereby, for it was held that the judge acted judicially, as judge, as he had jurisdiction of the

person of the juror, and jurisdiction of the subject-matter, to wit, the matter of punishing jurors for misbehavior as such, and that his judgment that the facts of that case warranted him in inflicting punishment was a judicial error, to be avoided and set aside in due course of legal proceedings, for which, however, he was not personally liable. Hammond v. Howell, Recorder of London, 2 Mod. 218; Bushell's Case, Vaughan, 135. So a judge of oyer and terminer was protected from indictment when he had made entry of record that some were indicted for felony before him; whereas, in fact, they were indicted for trespass only. 12 Coke, 25.

Thus it appears that the test is not alone that the act is done while having on the judicial character and capacity, nor yet is it alone that the act is not lawful.

We have seen, too, that the test is not that the act was in excess of jurisdiction, or alleged to have been done with malice and corruptly; for, even if it is such an act, it does not render liable the doer of the act, if he be a judge of a court of general or superior authority. Bradley v. Fisher, supra.

We think it clear that there is no liability to civil action, if the act was done "in a matter within his jurisdiction," to use the words of Gwynne v. Pool, supra. Those words mean that, when the person assumed to do the act as judge, he had judicial jurisdiction of the person acted upon, and of the subject-matter as to which it was done. Jurisdiction of the person is when the citizen acted upon is before the judge, either constructively or in fact, by reason of the service upon him of some process known to the law, and which has been duly issued and executed. What is meant by jurisdiction of the subject-matter we have had occasion to consider lately in Hunt v. Hunt, 72 N. Y. 217, 28 Am. Rep. 129. It is not confined within the particular facts, which must be shown before a court or a judge, to make out a specific and immediate cause of action. It is as extensive as the general or abstract question, which falls within the power of the tribunal or officer to act concerning.

Our idea will be illustrated by a reference to Groenvelt v. Burwell, 1 Ld. Raym. 454. There the defendants, as censors of a college of physicians, had imposed punishment on the plaintiff for what they adjudged was malpractice by him. He brought his action. They pleaded the charter of the college, giving them power to make by-laws for the government of all practitioners in medicine in London, and to overlook them and to examine their medicines and prescriptions, and to punish malpractice by fine and imprisonment; that they had, in the exercise of that power, adjudged the plaintiff guilty of mala praxis, and fined him twenty pounds, and ordered him imprisoned twelve months, nisi, etc. It was held that the defendants had "jurisdiction over the person of the plaintiff, inasmuch as he practiced medicine in London, and over the subject-matter, to wit, the unskillful administration of physic." That is the language of Holt, C. J., in that case.

And because the defendants had power to hear and punish, and to fine and imprison, it was held that they were judges of record, and, because judges, not liable for the act of fining and imprisoning. See, also, Ackerley v. Parkinson, 3 Maul. & Selw. 411.

It is the general abstract thing which is the subject-matter. The power to inquire and adjudge whether the facts of each particular case make that case a part or an instance of that general thing—that power is jurisdiction of the subject-matter. Thus in Hammond v. Howell, supra, the defendant was saved from liability to civil action, inasmuch as he had as judge jurisdiction of the subject-matter of punishing jurors for a misdemeanor upon the panel. He made an error in deciding that the facts of that case made an instance of that subject-matter. But the jurors were within his jurisdiction of their persons, and he had jurisdiction of the subject-matter, and his error was a judicial error—an act done quatenus judge, not an act as Howell, the private person, though it was an act contrary to law, grievous and oppressive upon the citizen.

The inquiry, then, at this stage of our consideration of the case, is this: Whether the defendant, sitting upon the bench of the Circuit Court, and being on that occasion de jure et de facto the Circuit Court, and having as such jurisdiction of all persons by law within the power of that court, and jurisdiction of all subject-matters within its cognizance, whether he had jurisdiction of the person of the plaintiff, and of any subject-matter wherefrom he had authority to hear and adjudge whether the facts in the case of the plaintiff, as then presented to him, fell within any of those subject-matters. It is not the inquiry whether the act then done as the act of the court was erroneous and illegal. That is but another form of saying whether it could or could not be lawfully done as a court by the person then sitting as the judge thereof. It is whether that court then had the judicial power to consider and pass upon the facts presented, and to determine and adjudge that such an act based upon them would be lawful or unlawful. * * *

It is true that the United States Supreme Court upon a certain state of facts before it, and in a proceeding by certiorari to which this defendant was not a party, and in which he was not heard by that court, reached the conclusion that the second sentence of the Circuit Court was pronounced without authority, and discharged the plaintiff from his imprisonment thereunder. Ex parte Lange, 18 Wall. 163, 21 L. Ed. 872. In the prevailing opinion given in the case are repeated expressions to the effect that the power of the Circuit Court to punish further than the first sentence, was gone; that its power to punish for that offense was at an end when the first sentence was inflicted, and the plaintiff had paid the $200 and laid in prison five days; that its power was exhausted; that its further exercise was prohibited; that the power to render any further judgment did not exist; that its authority was ended.

It is claimed from these expressions that the force of the decision in that case is that the defendant in pronouncing the second sentence upon the plaintiff did not act as a judge. It is plausible to say that if an act, sought to be defended as a judicial act, has been pronounced without authority and void, it could not have been done judicially. But we have yet to learn that the eminent court, which used that language in adjudging upon the case made upon that writ, would hold that the defendant did not act as a judge in pronouncing the judgment which was deemed without power to sustain it. The opinion also says: "Judgment may be erroneous and not void; and it may be erroneous because it is void. The distinctions between void and voidable judgments are very nice, and they may fall under the one class or the other, as they are regarded for different purposes."

We do not think that learned court would disregard the reasoning of Howell's Case, supra, and others like unto it. Yet in Bushell's Case, supra, he was discharged on habeas corpus, on the ground that Howell as judge had no power or authority to fine or imprison him for the cause set up. It was called "a wrongful commitment" (1 Mod. 184), as contrasted with "an erroneous judgment" (12 Mod. 381, 392); and yet when Howell was called to answer in a civil action for the act, it was held that though without authority it was judicial. In Bushell's Case, 1 Mod. 119, Hale, C. J., said: "The habeas corpus and the writ of error, though it doth make the judgment void, doth not make the awarding of the process void to that purpose"—i. e., of an action against the judge—"and the matter was done in a court of justice," he continued. So is the comment upon that case, in Yates v. Lansing, 5 Johns. 290: "It had jurisdiction of the cause because it had power to punish a misdemeanor in a juror, though in the case before the court the recorder made an erroneous judgment in considering the act of the juror as amounting to a misdemeanor, when in fact it was no misdemeanor." 2 Mod. 218. So in Ackerley v. Parkinson, supra, the defendant was held protected though the citation issued by him was considered as a nullity, on the ground that the court had a general jurisdiction over the subject-matter.

Let it be conceded, at this point, that the law is now declared that the act of the defendant was without authority and was void, yet it was not so plain as then to have been beyond the realm of judicial discussion, deliberation and consideration, as is apparent from the fact that four judges, other than the defendant, acting as judges, have agreed with him in his view of the law.

He was, in fact, sitting in the place of justice; he was at the very time of the act a court; he was bound by his duty to the public and to the plaintiff to pass as such upon the question growing out of the facts presented to him, and as a court to adjudge whether a case had arisen in which it was the demand of the law that, on the vacating of the unlawful and erroneous sentence or judgment of the court, another sentence or judgment could be pronounced upon the plaintiff.

So to adjudge was a judicial act, done as a judge, as a court, though the adjudication was erroneous, and the act based upon it was without authority and void. Where jurisdiction over the subject is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other involved in the case, although upon the correctness of his determination in those particulars, the validity of his judgment may depend. Ackerley v. Parkinson, supra. For such an act, a person acting as judge therein is not liable to civil or criminal action. The power to decide protects, though the decision be erroneous. See Garnett v. Farrand, 6 B. & C. 611. * * *

This act of the defendant was, then, one in excess of, or beyond, the jurisdiction of the court. And though, when courts of special and limited jurisdiction exceed their powers, the whole proceeding is coram non judice, and void, and all concerned are liable, this has never been carried so far as to justify an action against a judge of a superior court, or one of general jurisdiction, for an act done by him in a judicial capacity. Yates v. Lansing, supra; Bradley v. Fisher, supra; Randall v. Brigham, 7 Wall. 523, 19 L. Ed. 285. * * *

The case turns upon a question more easily stated than it is determined: Was the act of the defendant done as a judge? Our best reflection upon it, aided by the reasonings and conclusions of many more cases than we have cited, has brought us to the conclusion that as he had jurisdiction of the person and of the subject-matter, and as his act was not without the inception of jurisdiction, but was one no more than in excess of or beyond jurisdiction, the act was judicial. We are not unmindful of the considerations of the protection of the liberty of the person, and of the staying of a tendency to arbitrary exercise of power, urged with so much eloquence by the learned and accomplished counsel for the appellant. Nor are we of the mind of the court in 2 Mod. 218, 220, that "these are mighty words in sound, but nothing to the matter." They are to the matter, and not out of place in such a discussion as this. Nor have we been disposed to outweigh those considerations with that other class, which sets forth the need of judicial independence, and of its freedom from vexation on account of official action, and of the interest that the public have therein. See Bradley v. Fisher, supra; Taaffe v. Downs, in note to Calder v. Halket, 3 Moore, P. C. C. 28, 41, 51, 52. These are not antagonistic principles; they are simply countervailing. As with all other rules which act in the affairs of men, preponderance may not be fondly given to one to the disregard of the other; each should have its due weight yielded to it, for thus only is a safe equipoise reached.

We have arrived at our decision upon what we hold to be long and well established principles applied to the peculiar facts of this interesting case.

The judgment of the General Term should be affirmed. All concur, except ANDREWS, J., absent.

Judgment affirmed.[2]

GROVE v. VAN DUYN.

(Court of Errors and Appeals of New Jersey, 1882. 44 N. J. Law, 654, 43 Am. Rep. 412.)

BEASLEY, C. J. Most of the general principles of law pertaining to that branch of this controversy which relates to the alleged liability of the defendant in this suit, who was a justice of the peace, are so completely settled as not to be open to discussion. The doctrine that an action will not lie against a judge for a wrongful commitment, or for an erroneous judgment, or for any other act made or done by him in his judicial capacity, is as thoroughly established as are any other of the primary maxims of the law. Such an exemption is absolutely essential to the very existence, in any valuable form, of the judicial office itself; for a judge could not be either respected or independent if his motives for his official actions or his conclusions, no matter how erroneous, could be put in question at the instance of every malignant or disappointed suitor. Hence we find this judicial immunity has been conferred by the laws of every civilized people. That it exists in this state in its fullest extent has been repeatedly declared by our own courts. Such was pronounced by the Supreme Court to be the admitted principle in the cases of Little v. Moore, 4 N. J. Law, 75, 7 Am. Dec. 574, Taylor v. Doremus, 16 N. J. Law, 473, and Mangold v. Thorpe, 33 N. J. Law, 134, and by this court in Loftus v. Fraz, 43 N. J. Law, 667.

To this extent there is no uncertainty or difficulty whatever in the subject. But the embarrassment arises where an attempt is made to express with perfect definiteness when it is that acts done by a judge, and which purport to be judicial acts, are such within the meaning of the rule to which reference has just been made.

It is said everywhere in the text-books and decisions that the officer, in order to entitle himself to claim the immunity that belongs to judicial conduct, must restrict his action within the bounds of his jurisdiction, and jurisdiction has been defined to be "the authority of the law to act officially in the particular matter in hand." Cooley on Torts, 417. But these maxims, although true in a general way, are not sufficiently broad to embrace the principle of immunity that appertains to a court or judge exercising a general authority. Their defect is that they leave out of the account all those cases in which

[2] As to English law, see 1 Beven on Negligence, (2d Ed.) p. 275, and especially Kemp v. Neville, 10 C. B. (N. S.) 523 (1861).

American cases: Yates v. Lansing, 5 Johns. (N. Y.) 282 (1809); Randall v. Brigham, 7 Wall. 523, 19 L. Ed. 285 (1868); Bradley v. Fisher, 13 Wall. 335, 20 L. Ed. 646 (1871).

the officer in the discharge of his public duty is bound to decide whether or not a particular case, under the circumstances as presented to him, is within his jurisdiction, and he falls into error in arriving at his conclusion. In such instance, the judge, in point of fact and law, has no jurisdiction, according to the definition just given, over "the particular matter in hand," and yet, in my opinion, very plainly he is not responsible for the results that wait upon his mistake. And it is upon this precise point that we find confusion in the decisions.

There are certainly cases which hold that if a magistrate, in the regular discharge of his functions, causes an arrest to be made under his warrant on a complaint which does not contain the charge of a crime cognizable by him, he is answerable in an action for the injury that has ensued.[3] But I think these cases are deflections from the correct rule; they make no allowance for matters of doubt and difficulty. If the facts presented for the decision of the justice are of uncertain signification with respect to their legal effect, and he decides one way, and exercises a cognizance over the case, and if the superior court in which the question arises in a suit against the justice differs with him on this close legal question, is he open, by reason of his error, to an attack by action? If the officer's exemption from liability is to depend on the question whether he had jurisdiction over the particular case, it is clear that such officer is often liable under such conditions because the higher court, in deciding a doubtful point of law, may have declared that some element was wanting in the complaint which was essential to bring this case within the judicial competency of the magistrate. But there are many decisions which, perhaps, without defining any very clear rule on the subject, have maintained that the judicial officer was not liable under such conditions.

The very copious brief of the counsel of the defendants abounds in such illustrations. As an example, we may refer to the old case of Gwynne v. Poole, 2 Lutw. 387, in which it was held that the justice was justified because he had reason to believe that he had jurisdiction, although there was an arrest in an action which arose out of the justice's jurisdiction. This case has been since approved in Kemp v. Neville, 10 C. B. (N. S.) 550. Here, if the test of official liability had been the mere fact of the right to take cognizance over the particular matter in hand, considered in the light of strict legal rules, this decision would have been the opposite of what it is. In the same way the subject is elucidated in Brittain v. Kinnaird, 1 B. & B. 432, the facts being a conviction by a justice of a person of having gunpowder in a certain boat, a special act authorizing the detention of any suspected boat, and when the magistrate was sued in trespass for an illegal conviction, it was declared that the plaintiff, in order to show the defendants' want of cognizance over the proceedings leading to the conviction, could not give evidence that the craft in ques-

[3] See Century Digest, Justices of the Peace, §§ 36, 37, 39.

tion was a vessel and not a boat, because the justice had judicially determined that point. And in this case likewise the test of jurisdiction in the magistrate in point of fact and of law was rejected, an inquiry into the authority by force of which the proceedings had been taken being disallowed, for the reason that such question had been passed upon by the magistrate himself, the point being before him for adjudication.

The same doctrine was promulged in explicit and forcible terms by Mr. Justice Field, delivering the opinion of the Supreme Court of the United States, in the case of Bradley v. Fisher, 13 Wall. 335, 20 L. Ed. 646, this being his language: "If a judge of a criminal court, invested with general criminal jurisdiction over offenses committed within a certain district, should hold a particular act to be a public offense which it is not, and proceed to the arrest and trial of a party charged with such act, * * * no personal liability to civil action for such acts would attach to the judge, although those acts would be in excess of his jurisdiction, or of the jurisdiction of the court held by him, for these are particulars for his judicial consideration, whenever this general jurisdiction over the subject-matter is invoked."

These decisions, in my estimation, stand upon a proper footing, and many others of the same kind might be referred to; but such course is not called for, as it must be admitted that there is much contrariety of results in this field, and the references above given are amply sufficient as illustrations for my present purposes. The assertion, I think, may be safely made that the great weight of judicial opinion is in opposition to the theory that if a judge, as a matter of law and fact, has not jurisdiction over the particular case, that thereby, in all cases, he incurs the liability to be sued by any one injuriously affected by his assumption of cognizance over it. The doctrine that an officer having general powers of judicature must, at his peril, pass upon the question, which is often one difficult of solution, whether the facts before him place the given case under his cognizance, is as unreasonable as it is impolitic. Such a regulation would be applicable alike to all courts and to all judicial officers acting under a general authority, and it would thus involve in its liabilities all tribunals except those of last resort. It would also subject to suit persons participating in the execution of orders and judgments rendered in the absence of a real ground of jurisdiction. By force of such a rule, if the Supreme Court of this state, upon a writ being served in a certain manner, should declare that it acquired jurisdiction over the defendant, and judgment should be entered by default against him, and if, upon error brought, this court should reverse such judgment on the ground that the service of the writ in question did not give the inferior court jurisdiction in the case, no reason can be assigned why the justices of the Supreme Court should not be liable to suit for any injurious consequence to the defendant proceeding from their judg-

ment. As I have said, in my judgment, the jurisdictional test of the measure of judicial responsibility must be rejected.

Nevertheless it must be conceded that it is also plain that in many cases a transgression of the boundaries of his jurisdiction by a judge will impose upon him a liability to an action in favor of the person who has been injured by such excess. If a magistrate should, of his own motion, without oath or complaint being made to him, on mere hearsay, issue a warrant and cause an arrest for an alleged larceny, it cannot be doubted that the person so illegally imprisoned could seek redress by a suit against such officer.[4] It would be no legal answer for the magistrate to assert that he had a general cognizance over criminal offenses, for the conclusive reply would be that this particular case was not, by any form of proceeding, put under his authority.

From these legal conditions of the subject my inference is that the true general rule with respect to the actionable responsibility of a judicial officer having the right to exercise general powers is that he is so responsible in any given case belonging to a class over which he has cognizance, unless such case is by complaint or other proceeding put at least colorably under his jurisdiction. Where the judge is called upon by the facts before him to decide whether his authority extends over the matter, such an act is a judicial act, and such officer is not liable in a suit to the person affected by his decision, whether such decision be right or wrong. But when no facts are present, or only such facts as have neither legal value nor color of legal value in the affair, then, in that event, for the magistrate to take jurisdiction is not, in any manner, the performance of a judicial act, but simply the commission of an unofficial wrong. This criterion seems a reasonable one. It protects a judge against the consequences of every error of judgment, but it leaves him answerable for the commission of wrong that is practically willful. Such protection is necessary to the independence and usefulness of the judicial officer, and such responsibility is important to guard the citizen against official oppression.

The application of the above-stated rule to this case must, obviously, result in a judgment affirming the decision of the circuit judge. There was a complaint, under oath, before this justice, presenting for his consideration a set of facts to which it became his duty to apply the law. The essential things there stated were that the plaintiff, in combination with two other persons, "with force and arms," entered upon certain lands, and "with force and arms did unlawfully carry away about four hundred bundles of cornstalks, of the value," etc., and were engaged in carrying other cornstalks from said lands. By a statute of this state (Revision, p. 244, par. 99) it is declared to be an indictable offense "if any person shall willfully, unlawfully and

[4] See Tracy v. Williams, 4 Conn. 107, 10 Am. Dec. 102 (1821).

maliciously" set fire to or burn, carry off or destroy any barrack, cock, crib, rick or stack of hay, corn, wheat, rye, barley, oats or grain of any kind, or any trees, herbage, growing grass, hay or other vegetables, etc. Now, although the misconduct described in the complaint is not the misconduct described in this act, nevertheless the question of their identity was colorably before the magistrate, and it was his duty to decide it; and under the rule above formulated he is not answerable to the person injured for his erroneous application of the law to the case that was before him.

As to the other defendant, all he did was to make his complaint on oath before the justice, setting forth the facts truly, and for such an act he could not be held liable for the judicial action which ensued, even if such action had been extrajudicial. But as the case was, as we have seen, brought within the jurisdiction of the judicial officer, neither this defendant nor any other person could be treated as a trespasser for his co-operation in procuring a decision and commitment which were valid in law, until they had been set aside by a superior tribunal.

Let the judgment be affirmed.[5]

SECTION 34.—SAME—AGAINST ADMINISTRATIVE OFFICERS, ERROR AND ILLEGALITY

MOSTYN v. FABRIGAS.

(Court of King's Bench, 1774. Cowp. 161.)

Lord MANSFIELD.[6] This is an action brought by the plaintiff against the defendant for an assault and false imprisonment; and part of the complaint made being for banishing him from the Island of Minorca to Carthagena in Spain, it was necessary for the plaintiff, in his declaration, to take notice of the real place where the cause of action

[5] See Queen v. Wood, 5 El. & Bl. 49 (1855), post, p. 534.

French Code of Civil Procedure, art. 505:

Judges may be sued in the following cases:

(1) If there is malice, fraud, or corruption alleged to have been committed in the course of the examination, or in rendering judgment.

(2) If the right to sue is expressly given by law.

(3) If the law declares the judges liable in damages.

(4) If there is denial of justice.

Decisions of German Imperial Court, vol. 38, p. 338:

A judge in deciding causes must not be exposed to the risk of being held responsible for errors in rendering judgment. He may be held liable where he perverts justice deliberately. Otherwise he would be deprived of the independence indispensably necessary to the performance of his functions.

[6] The statement of facts and portions of the opinion are omitted.

arose. Therefore he has stated it to be in Minorca, with a videlicet, at London, in the parish of St. Mary le Bow, in the ward of Cheap. Had it not been for that particular requisite, he might have stated it to have been in the county of Middlesex. To this declaration the defendant put in two pleas: First, "not guilty;" secondly, that he was governor of Minorca by letters patent from the crown, that the plaintiff was raising a sedition and mutiny, and that in consequence of such sedition and mutiny, he did imprison him, and send him out of the island, which as governor, being invested with all the privileges, rights, etc., of governor, he alleges he had a right to do. To this plea the plaintiff does not demur, nor does he deny that it would be a justification in case it were true; but he denies the truth of the fact, and puts in issue whether the fact of the plea is true. The plea avers that the assault for which the action was brought arose in the island of Minorca, out of the realm of England, and nowhere else. To this the plaintiff has made no new assignment, and therefore by his replication he admits the locality of the cause of action.

Thus it stood on the pleadings. At the trial the plaintiff went into the evidence of his case, and the defendant into evidence of his; but on behalf of the defendant evidence different from the facts alleged in this plea of justification was given to show that the Arraval of St. Phillips, where the injury complained of was done, was not within either of the four precincts, but is a district of itself more immediately under the power of the governor, and that no judge of the island can exercise jurisdiction there, without a special appointment from him. Upon the facts of the case the judge left it to the jury, who found a verdict for the plaintiff, with £3,000 damages. The defendant has tendered a bill of exceptions, upon which bill of exceptions the cause comes before us; and the great difficulty I have had upon both the arguments has been to be able clearly to comprehend what the question is which is meant seriously to be brought before the court.

If I understand the counsel for Governor Mostyn right, what they say is this: The plea of not guilty is totally immaterial, and so is the plea of justification, because upon the plaintiff's own showing it appears, 1st, that the cause of action arose in Minorca, out of the realm; 2dly, that the defendant was governor of Minorca, and by virtue of such his authority imprisoned the plaintiff. From thence it is argued that the judge who tried the cause ought to have refused any evidence whatsoever, and to have directed the jury to find for the defendant; and three reasons have been assigned. One, insisted upon in the former argument, was, that the plaintiff, being a Minorquin, is incapacitated from bringing an action in the King's courts in England. To dispose of that objection at once, I shall only say it is wisely abandoned to-day; for it is impossible there ever could exist a doubt but that a subject born in Minorca has as good a right to appeal to the King's courts of justice as one who is born within the sound of Bow bell: and the objection made in this case, of its not being stated

on the record that the plaintiff was born since the treaty of Utrecht, makes no difference.

The two other grounds are: 1st. That the defendant being governor of Minorca, is answerable for no injury whatsoever done by him in that capacity. 2dly. That the injury being done at Minorca, out of the realm, is not cognizable by the King's courts in England.

As to the first, nothing is so clear as that to an action of this kind the defendant, if he has any justification, must plead it; and there is nothing more clear than that, if the court has not a general jurisdiction of the subject-matter, he must plead to the jurisdiction, and cannot take advantage of it upon the general issue. Therefore by the law of England, if an action be brought against a judge of record for an act done by him in his judicial capacity, he may plead that he did it as judge of record, and that will be a complete justification. So in this case, if the injury complained of had been done by the defendant as a judge, though it arose in a foreign country where the technical distinction of a court of record does not exist, yet sitting as a judge in a court of justice, subject to a superior review, he would be within the reason of the rule which the law of England says shall be a justification; but then it must be pleaded. Here no such matter is pleaded, nor is it even in evidence that he sat as judge of a court of justice. Therefore I lay out of the case everything relative to the Arraval of St. Phillip's.

The first point, then, upon this ground, is the sacredness of the defendant's person as governor. If it were true that the law makes him that sacred character, he must plead it and set forth his commission as a special matter of justification, because prima facie the court has jurisdiction. But I will not rest the answer upon that only. It has been insisted, by way of distinction, that supposing an action will lie for an injury of this kind committed by one individual against another, in a country beyond the seas, but within the dominion of the crown of England, yet it shall not emphatically lie against the governor. In answer to which I say that for many reasons, if it did not lie against any other man, it shall most emphatically lie against the governor.

In every plea to the jurisdiction, you must state another jurisdiction; therefore, if an action is brought here for a matter arising in Wales, to bar the remedy sought in this court, you must show the jurisdiction of the court of Wales; and in every case to repel the jurisdiction of the King's court, you must show a more proper and more sufficient jurisdiction; for if there is no other mode of trial, that alone will give the King's courts a jurisdiction. Now in this case no other jurisdiction is shown, even so much as in argument. And if the King's courts of justice cannot hold plea in such case, no other court can do it. For it is truly said that a governor is in the nature of a viceroy; and therefore locally, during his government, no civil or criminal action will lie against him. The reason is because upon

process he would be subject to imprisonment.[7] But here the injury is said to have happened in the Arraval of St. Phillip's, where without his leave no jurisdiction can exist. If that be so, there can be no remedy whatsoever, if it is not in the King's courts, because when he is out of the government, and is returned with his property into this country, there are not even his effects left in the island to be attached.

It does not follow from hence that, let the cause of action arise where it may, a man is not entitled to make use of every justification his case will admit of, which ought to be a defense to him. If he has acted right according to the authority with which he is invested, he must lay it before the court by way of plea, and the court will exercise their judgment whether it is a sufficient justification or not. In this case, if the justification had been proved, the court might have considered it as a sufficient answer; and, if the nature of the case would have allowed of it, might have adjudged that the raising a mutiny was a good ground for such a summary proceeding. I can conceive cases in time of war in which a governor would be justified, though he acted very arbitrarily, in which he could not be justified in time of peace. Suppose, during a siege or upon an invasion of Minorca, the governor should judge it proper to send an hundred of the inhabitants out of the island from motives of real and genuine expediency; or suppose upon a general suspicion he should take people up as spies; upon proper circumstances laid before the court, it would be very fit to see whether he had acted as the governor of a garrison ought, according to the circumstances of the case. * * *

Therefore, in every light in which I see the subject, I am of opinion that the action holds emphatically against the governor, if it did not hold in the case of any other person. If so, he is accountable in this court or he is accountable nowhere; for the King in council has no jurisdiction. Complaints made to the King in council tend to remove the governor, or to take from him any commission, which he holds during the pleasure of the crown. But if he is in England, and holds nothing at the pleasure of the crown, they have no jurisdiction to make reparation, by giving damages, or to punish him in any shape for the injury committed. Therefore to lay down in an English court of justice such a monstrous proposition as that a governor, acting by virtue of letters patent under the great seal, is accountable only to God and his own conscience, that he is absolutely despotic, and can spoil, plunder, and affect his Majesty's subjects, both in their liberty and property, with impunity, is a doctrine that cannot be maintained.

In Lord Bellamont's Case, 2 Salk. 625, cited by Mr. Peckham, a motion was made for a trial at bar, and granted, because the Attorney General was to defend it on the part of the King, which shows plainly that such an action existed. And in Way v. Yally, 6 Mod. 195, Justice Powell says that an action of false imprisonment has been brought

[7] See Hill v. Bigge, 3 Moore, P. C. 465, 481 (1841), contra.

here against a governor of Jamaica, for an imprisonment here, and the laws of the country were given in evidence. The governor of Jamaica in that case never thought that he was not amenable. He defended himself, and possibly showed, by the laws of the country, an act of the assembly which justified that imprisonment, and the court received it as they ought to do. For whatever is a justification in the place where the thing is done ought to be a justification where the cause is tried.

I remember, early in my time, being counsel in an action brought by a carpenter in the train of artillery, against Governor Sabine, who was governor of Gibraltar, and who had barely confirmed the sentence of a court-martial, by which the plaintiff had been tried, and sentenced to be whipped. The governor was very ably defended, but nobody ever thought that the action would not lie; and, it being proved at the trial that the tradesmen who followed the train were not liable to martial law, the court were of that opinion, and the jury accordingly found the defendant guilty of the trespass, as having had a share in the sentence, and gave £500. damages. * * *

Judgment affirmed.[8]

BASSETT v. GODSCHALL et al.

(Court of Common Pleas, 1770. 3 Wilson, 121.)

Action on the case for refusing to receive from plaintiff a certificate of character tendered upon an application for a license to keep a common inn and alehouse.

WILMOT, Chief Justice. The legislature hath intrusted the justices of peace with a discretionary power to grant or refuse licenses for keeping inns and alehouses; if they abuse that power, or misbehave themselves in the execution of their office or authority, they are answerable criminally, by way of information, in B. R.[9] I cannot think

[8] See Pollock, Torts, c. IV, 1, "Acts of State"; also Musgrove v. Chun Teeong Toy, [1891] A. C. 272, 282, 283.

As to statutes for protection of officers, see Chitty, Pleading, I, 545, 546; Public Authorities Protection Act, 1893, 56 & 57 Vict. c. 61.

Compare Martin v. Mott, 12 Wheat. 19, 6 L. Ed. 537 (1827), post, p. 48; Wise v. Withers, 3 Cranch. 331, 2 L. Ed. 457 (1806).

There seems to be no precedent in the United States for an action against a chief executive (President or Governor) during his term of office to recover damages for an alleged wrongful act done in his official capacity or in connection with his office.

For such an action, brought after the expiration of the term of office, see Livingston v. Jefferson, 1 Brock. 203, Fed. Cas. No. 8,411 (1811), which was, however, dismissed on a point of venue.

For actions against heads of departments, see Kendall v. Stokes, 3 How. 87, 11 L. Ed. 506 (1845), and Spalding v. Vilas, 161 U. S. 483, 16 Sup. Ct. 631, 40 L. Ed. 780 (1896); also 5 Ops. Attys. Gen. 759 (1823).

[9] As to criminal liability, see Rex v. Williams, 3 Burr. 1317 (1762); People v. Norton, 7 Barb. (N. Y.) 477 (1849).

a justice of peace is answerable in an action to every individual who asks him for a license to keep an inn or an alehouse, and he refuses to grant one; if he were so, there would be an end of the commission of the peace, for no man would act therein. Indeed, he is answerable to the public if he misbehaves himself, and willfully, knowingly and maliciously injures or oppresses the King's subjects, under color of his office, and contrary to law; but he cannot be answerable to every individual, touching the matter in question, in an action. Every plaintiff in an action must have an antecedent right to bring it; the plaintiff here has no right to have a license, unless the justices think proper to grant it, therefore he can have no right of action against the justices for refusing it.

Judgment for defendants.[10]

PARTRIDGE v. GENERAL COUNCIL OF MEDICAL EDUCATION AND REGISTRATION OF UNITED KINGDOM.

(Supreme Court of Judicature, Queen's Bench Division, 1890. 25 Q. B. D. 90.)

Action for unlawfully and maliciously causing the plaintiff's name to be removed from the register kept under the Dentists' Act, 1878.

Lord ESHER, M. R. In this case an action is brought against the defendants for unlawfully and maliciously removing the name of the plaintiff from the dentists' register. I think that the learned judge who tried the case must be taken to have found that the defendants acted without malice. It is perfectly clear to my mind that his finding is right, and that in doing what they did they were not acting maliciously, but endeavoring to do their duty to the public and their profession. But nevertheless, it it clear that, in doing what they did on this occasion, they did not take the course which they ought to have taken. They struck off the plaintiff's name without communicating with him or giving him an opportunity of being heard. When the case came before us on the previous occasion,[11] the question then being whether he was wrongly struck off the register, we said they had not taken the proper steps, and they must put his name on the register again, without prejudice to the question whether on subsequent inquiry there might appear to be proper grounds for striking him off under section 13 of the act. But the question, upon an application for a mandamus to have his name reinserted on the register, whether they acted rightly in striking him off, in the sense that they took the proper steps, is quite a different question from the question whether an action will lie against them, in the absence of malice, for wrongfully removing his name.

[10] Accord: Halloran v. McCullough, 68 Ind. 179 (1879).

[11] See Ex parte Partridge, 19 Q. B. D. 467 (1887).

The question now is whether such an action will lie? I think the defendants were intending, in what they did, to do what they were entitled to do, viz., to perform the public duties imposed upon them by the act for the protection of the public and also of the profession. There are two sections, apparently, which are material to this question, the eleventh and the thirteenth. It seems to me that the thirteenth was the section under which they ought to have acted, if there was any question of erasing the name of a person from the register for having acted disgracefully in a professional respect. But I think that in any case they bona fide intended to act under the act of Parliament which gives them powers as to the register. That being so, the question is whether they were acting merely ministerially. Whether they were intending to act under section 11 only, or under section 13 as well, if they were not so acting, it appears to me that in the absence of malice they are protected from an action. If they were acting under section 13, I think the functions they were so exercising were clearly judicial, and not merely ministerial, and that they would, therefore, not be liable to an action for the erroneous exercise of those functions without malice. If they were intending to do what they were authorized to do under section 13, but were advised to proceed under the wrong section, I think they would not be liable to an action for acting erroneously under a wrong section of the act, as they intended to act under the act and what they did was not merely ministerial.

But, assuming that they were not intending to exercise the functions given by section 13 at all, but were proceeding solely under section 11, without regard to those functions, what is it they have to do under that section? The power given to them is a power to give a special direction to the registrar. They have, then, given a special direction to the registrar to erase the plaintiff's name. Is giving a special direction to the registrar under that section merely a ministerial act, to be done without the exercise of any discretion at all? I do not think so. I think it is clearly discretionary. Now it appears to me that it is a true proposition to say that, when a public duty is imposed by act of Parliament upon a body of persons, which duty consists in the exercise of a discretion, it cannot be said that the exercise of that discretion is a merely ministerial act. If what the defendants did cannot be considered to have been merely ministerial, then I think, for the purposes of the question whether they are protected from an action, it must be considered as judicial. It appears to me that a body such as the defendants can only be made subject to an action for things which they have done erroneously without malice in carrying out their duties under the act, if it can be shown that they were acting merely ministerially.

It is not necessary to go through the cases that have been cited on the subject. They seem to me all to show that such an action as this cannot be maintained, except where the duty intended to be exercised

is only ministerial. For these reasons it appears to me that this action is not maintainable, and that the judgment of Hudleston, B., was correct.[12]

SEAMAN v. PATTEN.

(Supreme Court of New York, 1805. 2 Caines, 312.)

On certiorari to the justices' court in the city of New York.

It appeared from the return that the action below was brought against the now plaintiff to recover from him, as inspector general of provisions, twenty-five dollars, for condemning, as unmerchantable, some beef belonging to the present defendant. The record stated: That at the trial the now plaintiff moved for a nonsuit, because the barrel containing the beef had not been branded with the name of the maker, according to the directions of the act; because, also, no malice or corruption was proved. That these reasons were disallowed, because the court were of opinion, on the first point, that an offer by the cooper, or his authorized agent, to brand the barrels, and a refusal by the inspector to permit them to be branded, were equivalent to a branding; and, on the second, because it was not necessary to prove malice or corruption, to sustain the action, the inspector general being liable for injuries arising from want of skill.

Error having been assigned on each of these grounds, the case now came before the court.

LIVINGSTON, J., delivered the opinion of the court. In our opinion the judgment rendered on this verdict is erroneous, and must be reversed.

Without denying the general principle (which is too well settled to admit of controversy) that unless the Legislature provide for the protection of officers of this description, they act at their peril, although their conduct be bona fide, and according to the best of their judgment, there are, in this case, sufficient marks of distinction to justify our not adding it to the revolting precedents which are already to be found on this subject. In making use of this term, I do but little more than follow the example of most judges who have been called on to enforce a rule which they admit to be a hard one, and against the operation of which modern legislators, unless from oversight, generally take care to guard. The whole court, in the case of Warne v. Varley, 6 T. R. 443, seem solicitous to discover

[12] Section 11 of the Dentists' Act provides that every registrar, shall in all respects, in the exercise of his discretion and duty in relation to any register under this act, conform to any orders made by the general council under this act, and to any special directions given by the general council. Section 13 provides that the general council may cause inquiry to be made into the case of a person alleged to be liable to have his name erased from the register, on proof of conviction of a felony or misdemeanor, or of infamous or disgraceful conduct.

some ground on which the defendant, who had acted fairly and bona fide, might escape. This liability was first enforced against officers who acted as volunteers, and generally received a portion of the spoil. These were collectors and excise officers, who were neither bound by oath, nor enjoined by law, to make seizures, but might do so or not, as they pleased. Thus in Imlay v. Sands, 1 Caines, 566, decided in February term, 1804, the defendant, who was collector of the port of New York, in seizing a vessel, with a very valuable cargo, was under no legal injunction to do so, and would have been entitled to a very considerable share of the proceeds arising from confiscation.[13] In such case there is no rigor in letting an officer act at his peril, and in putting his justification on the event. But when persons in a public capacity act upon oath, in matters, too, which require skill and experience, and in which men may honestly differ in opinion, it seems cruel not to protect them when they conduct themselves with integrity, and without abusing their authority, or manifesting any symptoms of malice.

But this alone, if the case of Warne v. Varley be a precedent, affords no justification. Some other excuse, then, must be found for the plaintiff, or he cannot escape. Let us, then, see whether, in the terms of the law, an ample justification will not be found, and such a one as the Court of King's Bench seemed willing to admit in the case just mentioned. The defendant there pleaded that he had seized the leather because, "in his judgment, the same was not well dried." But the act of Parliament had not given him authority to seize what, in his judgment, was not sufficiently dried, but only generally to seize leather of that description, without referring to his judgment at all. If it had, Lord Kenyon would not have held him liable. "It seems reasonable," says he, "that if these searchers exercise their authority bona fide, and only seize such leather as in their judgment ought to be examined, they should be protected; but the act of Parliament affords them no such protection." From this mode of expression, as well as from the reason of the thing, it is clear that, where the judgment or opinion of the officer is expressly referred to by law as the rule of his conduct, he cannot, and ought not, to be answerable for an upright use of it, but is as much protected by a clause of this kind as by those which are usually introduced for this purpose. This reference will be found throughout the law under which Seaman acted, and must have been made to prevent his being harassed by demands of this nature. Everything almost which, as inspector general, he is to do, is to depend on his judgment or opinion. He swears "he will faithfully and impartially, according to the best of his ability, perform his duty, without any willful omission, neglect, or delay whatever."

[13] As to history of compensation of revenue officers, see U. S. v. Walker, 22 How. 299, 16 L. Ed. 382 (1859); also 1 Rev. St. N. Y. (1st Ed.) pp. 340, 356. For early action of trespass against customs officers, see Hubert Hall, Customs Revenue, II, 42.

Is it not a little extraordinary that, when the Legislature exact no more of a man than an exertion of his best abilities, he should still be responsible, merely because another may have more ability or capacity than himself?

The fourth section authorizes him to remove without the city all such beef and pork as shall appear to him to be in danger of spoiling, etc. Will it be said that he would also be liable, if he should bona fide order any of these articles to be removed, if it turned out that they were in no danger of spoiling? Shall it be his duty to remove these articles, shall he swear that he will perform his duty, nay, shall he be liable to a heavy penalty for neglect, and shall his own opinion be made the only criterion of the necessity or propriety, and shall he not dare to exercise it? So again, in the same section, he is to order beef or pork, in a putrid state, to be removed, if in his opinion the removal be necessary. Surely it would be a satisfactory defense to an action, on this part of the statute, to say that the removal in his opinion was necessary. Why vest such power in him, as a security for the health of the city, if he be not to use it? If too latitudinary, the Legislature, and not he, is to blame.

Again, by the first section he may remove certain provisions, if in his judgment it be proper. The eleventh section, in like manner (and this applies more immediately to the present action), declares that the barrels, in which beef shall be repacked (which must, of course, be judged of before they can be inspected), shall, in the opinion of the inspector general, be every way strong, and tight enough to prevent the pickle from leaking out. Now, if this be an action for not inspecting the beef, and it can be no other, notwithstanding the inaccuracy of the return, calling it an action for condemning the property, which the inspector could not do, who can say that the plaintiff was of opinion that the barrel was as tight and strong as it ought to be? If he were not, it was his duty, however incorrect the opinion may have been, to refuse its inspection; for it must be an incontrovertible position that when by law it is made the duty of a public agent, however high or low his station, to do a thing, if in his opinion certain requisites are complied with, he can never be liable for omitting to act (which it is attempted to make him here), without proving corruption, malice, or some misbehavior. It does not appear why the beef was refused. It may have been for the very cause just mentioned, which would be a complete defense.

But if the inspector proceeded on the ground, as it would seem he did, of the barrel's not being branded with the name of the person who made it, he was also justifiable. The sixteenth section is explicit on this point, and it is admitted no such brand appeared. An offer to brand was not sufficient. It is idle to say that the inspector general refused to let it be done. He had no control over the cooper, or the cask. The defendant might have taken it away, and returned it prop-

erly branded. On this point the justices were also mistaken. The party, to entitle his beef to inspection, should have taken care to have put it in the state required by law. Until that was done, the inspector had nothing to do with it, or with his offers. But if the cask had been properly branded, the inspector had a right, by law, if he thought proper for other reasons, to refuse its inspection, and this is the ground on which we proceed.

There is yet another distinction between this action and those which are generally brought against public officers. The latter are almost always actions for some tort, such as seizing the plaintiff's property, or breaking into his house, or the like; whereas this is an attempt to charge him, not for a sin of commission, but for one of omission. It may well be doubted whether this alone would not justify our deciding it on principles different from those which have heretofore governed, in the cases referred to. But without pursuing this inquiry, our opinion is that an officer, acting under a commission from government, who is enjoined by law to the performance of certain things, if in his judgment or opinion the requisites therein mentioned have been complied with, and inhibited, under the like exercise of his own discretion, from doing other things, who is sworn to discharge these duties to the best of his ability, and exposed also to penalties, as well for negligence as for acting where he ought not, is not answerable to a party, who may conceive himself aggrieved for an omission arising from mistake or mere want of skill, if there be no bad faith, corruption, malice, or some misbehavior, or abuse of power. Nothing of the kind appearing here, the judgment must be reversed.

Judgment of reversal.[14]

LINCOLN v. HAPGOOD.

(Supreme Judicial Court of Massachusetts, 1814. 11 Mass. 350.)

Case against the defendants, for that, when acting and presiding as selectmen of the town of Petersham, at a meeting then duly convened and holden for the election of a representative in May, 1812, they refused the plaintiff's vote there offered, although a qualified voter, entitled to vote in the said election, etc. * * * The refusal of the plaintiff's vote was admitted on the part of the defendants, and the cause was left to the jury, with a direction from the judge to find a verdict for the plaintiff, if his home and residence had been proved to be at Petersham, notwithstanding his occasional absences at Belchertown,

[14] As to inspectors, see note, 95 Am. St. Rep. 132 (1895); Nickerson v. Thompson, 33 Me. 433 (1851); Gordon v. Livingston, 12 Mo. App. 267 (1882). As to malice, see Gregory v. Brooks, 37 Conn. 365 (1870); Spalding v. Vilas, 161 U. S. 483, 16 Sup. Ct. 631, 40 L. Ed. 780 (1896).

and his being permitted to vote there, and actually voting there at the April meetings. And the judge consented to reserve the question of the plaintiff's qualification.

The judge also ruled that evidence of malicious and injurious intentions was not necessary in this case, to entitle the plaintiff to recover damages for the privation of his franchise by the act of the selectmen, if their conduct had not proceeded from an unavoidable mistake of any fact, uncertain in the nature of the proof upon which it depended, but from a mistake of the law, they having undertaken to decide upon the rights of the plaintiff; and upon this point also the case was reserved by the judge. The jury returned a verdict for the plaintiff, which was taken, subject to the opinion of the court upon the questions so reserved.

PARKER, C. J.[15] As to the first point reserved for the consideration of the court, we are of opinion that the plaintiff had a legal right to vote in the choice of representatives in Petersham. * * *

But a more difficult question remains, and that is whether the defendants in this case, who are public officers without reward, and upon whom the difficult task is imposed by law of deciding suddenly upon the qualifications of voters, are liable in damages for an error of judgment only, when they have been guilty of no malice, and have exercised an honest and fair judgment upon the question before them? The case does not impute any corrupt motive, or even any negligence in performance of duty, to the defendants. The presumption therefore must be that they erred through ignorance.

This is not a new question with us, although it has never been formally decided by the whole court. In the case of Gardner v. Ward et al., 2 Mass. 244, which is the first action of the kind in this state of which we have a report, no question appears to have been made by the counsel or the court as to the liability of the selectmen if they erroneously decided against the plaintiff's rights, although his vote was rejected in that case upon the ground of his alienage; a point which honest and well-informed men, not lawyers, might determine wrongly with the best possible motives.

In a like case, which occurred the succeeding year in the same county (Kilham v. Ward, 2 Mass. 236), we find this objection to the action in the argument of the counsel; but no reply to it from the other side, and no notice taken of it by the court, from which we may infer that it was not much relied on as an important point in the cause.

Since that time, however, actions of this kind having multiplied in all parts of the commonwealth, in consequence of an increased interest in the elections, it has become a matter of serious consideration whether the selectmen of towns, acting fairly in discharge of a duty imposed upon them by law, shall be exposed to actions for a mere mistake of the law, or misapprehension of facts; whether in truth they are not to be viewed as judges, and so entitled to the common privilege of the

[15] Only a portion of this case is printed.

judicial character, not to be punished, or to be responsible in damages, for any consequence of a judgment merely erroneous.

I confess I have for some time maintained the affirmative upon this question, and have, in one or two instances at nisi prius, given this opinion, reserving a right to the plaintiffs to have the question decided by the whole court. But long reflection upon the subject, and the reasoning of those of my Brethren who have inclined to the opposite opinion, have finally satisfied me that I was mistaken, and that, however hard such an action may be against selectmen, it is essential to the rights of the citizen that it should be sustained.

The right of voting, in such a government as ours, is a valuable right; it is secured by the Constitution; it cannot be infringed without producing an injury to the party; and although the injury is not of a nature to be effectually repaired by a pecuniary compensation, yet there is no other indemnity, which can be had. In such a case, as in the case of an injury to the reputation, and sometimes to the feelings, the good of society, and security against a repetition of the wrong, require that the suffering party should be permitted to resort to this mode of relief.

The selectmen of a town cannot be proceeded against criminally for depriving a citizen of his vote, unless their conduct is the effect of corruption, or some wicked and base motive. If, then, a civil action does not lie against them, the party is deprived of his franchise without any relief, and has no way of establishing his right to any future suffrage. Thus a man may be prevented, for his life, from exercising a constitutional privilege, by the incapacity or inattention of those who are appointed to regulate elections.

The decision of the selectmen is necessarily final and conclusive as to the existing election. No means are known by which the rejected vote may be counted by any other tribunal, so as to have its influence upon the election, or at least no practice of that kind has ever been adopted in this state. There is, therefore, not only an injury to the individual, but to the whole community; the theory of our government requiring that each elective officer shall be appointed by the majority of the votes of all the qualified citizens who choose to exercise their privilege.

Now, if a party duly qualified is unjustly prevented from voting, and yet can maintain no action for so important an injury, unless he is able to prove an ill design in those who obstruct him, he is entirely shut out from a judicial investigation of his right; and succeeding injuries may be founded on one originally committed by mistake. He may thus be perpetually excluded from the common privilege of citizens, without any lawful means of asserting his rights, and restoring himself to the rank of an active citizen. Such a doctrine would be inconsistent with the principles and provisions of our free Constitution, and must give way to the necessity of maintaining the people in their rights, secured to them by the form of their government.

This principle has not been perhaps precisely settled in England, although I apprehend, in the case of Ashby v. White, 2 Ld. Raym. 938, the principle upon which this action is to be maintained was fully recognized by Lord Holt, and afterwards by the House of Lords, who reversed the judgment given by the three other judges of the King's Bench, against the opinion of that eminent judge. The argument, upon which that case turned, was that an actual injury had been done, and that it was inconsistent with the character of the English laws that there should be no remedy for a subsisting injury. No question seems to have been made in that cause of malice in the returning officer; probably none was suggested. But the officer was finally holden to be answerable in an action on the case, on the mere ground that he had refused to receive the vote of a subject, who was entitled to vote. This is exactly the present case, although perhaps we are not authorized to say that malice or fraud, or corruption, was not proved in the case. But it does not appear that any such motive was considered by the judge as influencing the determination.

In a later case, however, of Drewe v. Coulton, cited in a note to the case of Harman v. Tappenden et al., 1 East, 563, Mr. Justice Wilson nonsuited a plaintiff in such an action, because it did not appear that the defendants acted maliciously. The nonsuit being acquiesced in by eminent counsel, it is fair to suppose that an action of [on] the case cannot now be maintained in England for rejecting a vote, unless the injury is proved to have been done maliciously.

But in England another remedy exists, which does not exist with us. The electors there all vote viva voce. Their names are taken down by the returning officer, as well those whose votes are received as those who are not permitted to vote, and also the name of the candidate for whom they would vote, of which a return is made to the House of Commons. There a revision by a committee takes place; and the rejected vote is counted, and has its effect upon the election, if it was unlawfully rejected. But with us there is no such remedy; and without an action there is no remedy at all, either for the immediate or any subsequent election.

But notwithstanding we deem it necessary that this action should be supported, as the only mode of ascertaining and enforcing a right which has been disputed, we do not think it ought to be a source of speculation to those who may be ready to take advantage of any injury, and turn it to their profit, to the vexation and distress of men, who have unfortunately been obliged to decide on a question sometimes intricate and complicated, but who have discovered no disposition to abuse their power for private purposes. And we therefore think that juries should always, in estimating the damages, have regard to the disposition and temper of mind discoverable in the act complained of; and probably the court would determine that a sum, comparatively not large, would be excessive damages in a case where no fault, but ignorance or mistake, was imputable to the selectmen.

On the other hand, in cases in which it should be apparent that there was a willful deviation from duty, and a wanton rejection of a vote, from party motives, or from personal hostility to the citizen whose vote is refused, or even a negligent or inattentive examination of his claim, exemplary damages would be required, as a compensation to the injured party, and an expiation of the high and aggravated offense against the civil and political privileges of the citizen.

Upon the whole, we see no better way than to leave cases of this kind to the jury, under the direction of the court; nor have we any doubt that a correct public sentiment will apply the remedy in each case, proportionately to the offense, so that, on one hand, a man who has been, without any fault of his own, deprived of a valuable privilege should find indemnity and protection in the laws, and, on the other, that men who are in places of public trust should not be subject to too severe a penalty for an involuntary failure in a proper performance of their duty.

Judgment on the verdict.[16]

JENKINS v. WALDRON.

(Supreme Court of New York, 1814. 11 Johns. 114, 6 Am. Dec. 359.)

In error, on certiorari, from a justice's court. Waldron brought an action on the case against Seth Jenkins, Erastus Pratt, Daniel Clark and William Coventry, the plaintiffs in error, as inspectors of the election held in Hudson, in Columbia county, in April, 1811, for refusing to receive his vote, as an elector, etc.

The plaintiff below stated, in his declaration, that the defendants below were inspectors of the poll in the city of Hudson, at the general election in 1811; that the plaintiff was duly qualified to vote for members of the assembly; that he tendered his vote to the defendants; and that they wickedly and designedly refused his vote, and would not permit him to exercise his right of suffrage, to his damage, etc. The defendants pleaded the general issue.

The following facts appeared in the justice's return, as proved and admitted on the trial before him. The defendants below were duly elected and sworn as inspectors at the general election in 1811, and acted as such when the plaintiff below offered his vote at the poll for members of assembly. The plaintiff is a black or colored man, and at the time he offered his vote he tendered a certified copy of a certificate of his being a free man, under the hand and seal of Samuel Edmonds, one of the judges of the Court of Common Pleas of the county of

[16] See Kinneen v. Wells, 144 Mass. 497, 11 N. E. 916, 59 Am. Rep. 105 (1887). Accord: Jeffries v. Ankeny, 11 Ohio, 372 (1842): "When we reflect how highly the privilege of voting is generally valued, and that the Legislature has provided and the forms of law admit no other remedy than this action, we unite in the opinion that a necessity exists for entertaining this remedy."

Columbia, dated 9th April, 1811, which certificate was recorded in the office of the clerk of the town of Livingston, and the copy was certified by the clerk of that town. The plaintiff offered, at the same time, to make any other proof of his qualification to vote that the inspectors might require, and to take the oaths required by law. The defendants below rejected the plaintiff's vote, solely on the ground that Samuel Edmonds, at the time of giving the certificate of freedom, was not a judge according to law, and, therefore, not authorized to give the certificate. The inspectors declared they did not require any other proof of the plaintiff's qualification to vote, except a different certificate, or such a one as they should deem legal and valid.[17]

SPENCER, J., delivered the opinion of the court.

It is not necessary to the decision of this cause to pronounce any opinion on the question whether Judge Edmonds was a judge de jure or de facto when he gave the certificate that the defendant had duly proved himself to be a free man; for, admitting that Judge Edmonds was either, this action, as laid, is not maintainable. It is not alleged or proved that the inspectors fraudulently or maliciously refused to receive Waldron's vote; and this we consider to be absolutely necessary to the maintenance of an action against the inspectors of an election.

The case principally relied on by the counsel for the defendant in error is that of Ashby v. White, 2 Ld. Raym. 938. There the declaration alleged that the rejection of Ashby's vote was done fraudulently and maliciously, and, although the jury found the defendant guilty, the judgment was arrested by three judges, in opposition to the opinion of Chief Justice Holt. This judgment was afterwards reversed in the House of Lords. The reasons for the reversal do not appear in the report of the case; but the ground of the reversal is distinctly stated in the resolutions of the Lords, in answer to the resolutions of the Commons, reprehending the bringing the action and the judgment thereon. The first resolution of the Lords states "that by the known laws of this kingdom, every freeholder, or other person having a right to give his vote at the election of members to serve in Parliament, and being willfully denied, or hindered so to do, by the officers who ought to receive the same, may maintain an action in the Queen's courts against such officer, to assert his right, and to recover damages for the injury." 1 Bro. Parl. Cas. (1st Ed.) 49.

The case of Harman v. Tappenden and Others, 1 East, 555, and Drewy v. Coulton, in a note to that case, clearly show that this action is not maintainable, without stating and proving malice, express or implied, on the part of the officers. In the case in the text, Lawrence, J., said, "There is no instance of an action of that sort maintained for an act arising merely from error of judgment;" and he cited Mr. Justice Wilson's opinion in Drewy v. Coulton with approbation. In that case the suit was for refusing the plaintiff's vote. Justice Wilson considered

[17] The statement of facts is abridged.

it as an action for misbehavior by a public officer in the discharge of his duty, and that the act must be malicious and willful to render it a misbehavior; and he held that no action would lie for a mistake in law. In speaking of the case of Ashby v. White, he considered it as having been determined by the House of Lords on that ground, from the resolutions entered into by them. The whole of Judge Wilson's reasoning is clear, perspicuous and irresistible; and is fully confirmed in Harman v. Tappenden. It would, in our opinion, be opposed to all the principles of law, justice and sound policy to hold that officers, called upon to exercise their deliberative judgments, are answerable for a mistake in law, either civilly or criminally, when their motives are pure, and untainted with fraud or malice.

Judgment reversed.[18]

WHEELER v. PATTERSON.

(Superior Court of Judicature of New Hampshire, 1817. 1 N. H. 88, 8 Am. Dec. 41.)

Case against the defendant for illegally and maliciously rejecting the plaintiff's vote for Governor of this state, at a town meeting in Temple, March 12, 1816, the defendant being moderator of the meeting, and the plaintiff legally entitled to vote.

The cause was tried in this county at the last April term upon the general issue, when it was satisfactorily proved that the plaintiff was legally entitled to vote for Governor, and that his vote had been refused by the defendant, who was moderator of the meeting, as alleged in the declaration; but the court directed the jury that they ought not to find a verdict for the plaintiff, unless they believed that the defendant had refused the vote maliciously, and from improper motives, and under this direction the jury returned a verdict for the defendant.

The plaintiff moved the court to grant a new trial on the ground of a misdirection in thus instructing the jury, and the cause was continued to this term for advisement.

RICHARDSON, C. J.[19] It seems that an action of this description cannot be maintained in England, without alleging and proving malice. Ashby v. White, 2 L. Raymond, 938; 6 Mod. 45; 1 East, 555, 563, note; 1 Bro. Par. Cas. 49. The law is settled to be the same in New York. Jenkins et al. v. Waldron, 11 Johns. 114, 6 Am. Dec. 359.

[18] Accord: Carter v. Harrison, 5 Blackf. (Ind.) 138 (1839); Rail v. Potts, 8 Humph. (Tenn.) 225 (1847); Gordon v. Farrar, 2 Doug. (Mich.) 411 (1847); Peavey v. Robinson, 48 N. C. 339 (1856); Perry v. Reynolds, 53 Conn. 527, 3 Atl. 555 (1885).

With reference to the case of Ashby v. White, 2 Ld. Raym. 938 (1703), see Campbell's Lives of the Chief Justices, III, 41–45.

See statute of Illinois (Act Feb. 12, 1849, p. 75, § 20), allowing action on the case for refusal of vote, damages not to exceed $500, since repealed.

[19] Only a portion of the opinion by Richardson, C. J., is printed.

But in Massachusetts it has been solemnly decided to be otherwise, and their courts hold that those who reject the vote of a qualified elector are liable, although not chargeable with malice. Lincoln v. Hapgood, 11 Mass. 350. * * *

But, notwithstanding we entertain the most entire respect for the decisions of that court, we have not been able, after the most mature reflection, to adopt their opinion upon this subject. * * *

It is true that moderators may decide wrongly with the best intentions, and then the party will be without remedy. And so may a court and jury decide wrongly, and then the party will also be without remedy. Perfect justice in all cases never was and never will be administered in any human tribunal, and yet human tribunals must be intrusted with the ultimate decision upon our most important rights. So long as moderators act honestly and conscientiously, no great injustice will be done, even if they be intrusted to decide finally upon the rights of electors. If those rights, however, shall be found not to be sufficiently secure in the hands of moderators, the Legislature can provide further remedy; but to use the language of the Supreme Court of New York, on this subject, "it would in our opinion be opposed to all the principles of law, justice, and sound policy to hold that officers, called upon to exercise their deliberative judgments, are answerable for mistakes in law either civilly or criminally, when their motives are pure and untainted with fraud or malice." 11 Johns. 121.

Judgment on the verdict.

EASTON v. CALENDAR.

(Supreme Court of New York, 1833. 11 Wend. 90.)

Error from the Onondaga common pleas.

Calendar sued Easton and two others, trustees of a school district, in trespass, they having issued a warrant by virtue of which was sold a cow belonging to him. The defendants justified under a vote of a district meeting to raise by tax the sum of $168.75 to repair the district schoolhouse. The trustees made out a tax list, purporting to contain the names of the taxable inhabitants of the district, setting opposite the name of each inhabitant the amount of his assessment, and of tax to be paid by him. Calendar's name was on the list, the amount of tax to be paid by him was set down at $11.59, and the whole amount of tax to be paid in the district, according to the list, was $177.65. The warrant issued by the trustees directed the collector to "collect from each of the inhabitants in the annexed tax list named the sum of money set opposite to his or her name in said list, and within thirty days after receiving this warrant to pay the amount thereof, collected by you (retaining five per cent. for your

fees), into the hands of the trustees, etc. It was proved on the part of the plaintiff that the names of three individuals who lived in the district were not on the tax list, and those individuals owned farms situate in the district. On the part of the trustees, it was proved that there were other individuals, besides those named on the tax list, who resided in the district and whose names were not on the list; but the witnesses could not say whether they were or were not taxable.

The suit was commenced before a justice by summons, which was served personally on two of the defendants, viz., S. Favor and J. Easton, and by copy on Everson, the third defendant. On the return of the summons, Everson did not appear. The other two defendants did appear, and joined issue with the plaintiff, which issue was subsequently tried before the justice, and judgment rendered in favor of the defendants for costs. The plaintiff sued out a certiorari to the Onondaga common pleas, which court reversed the judgment of the justice, and rendered judgment for the costs of prosecuting the certiorari in favor of Calendar against Favor, Easton and Everson. Whereupon the defendant sued out a writ of error.

NELSON, J. The inhabitants of a school district are empowered to lay a tax on themselves for specified purposes (1 Rev. St. p. 478, § 61), and the trustees of such district are required to make out a tax list whenever a district tax is voted, containing the names of all the taxable inhabitants residing in the district at the time of making out the list, and the amount of tax payable by each inhabitant, set opposite to his name, and to annex to such tax list a warrant directed to the collector of the district for the collection of the sums in such list mentioned, with five cents on each dollar thereof for his fees (Id. p. 481, § 75). The collector is allowed five cents on every dollar collected and paid over by him (Id. p. 486, § 104). On failure to collect the tax upon the warrant, the trustees in certain specified cases may sue and recover it in their official names. The better opinion, I think, is that the collector is not entitled to the five per cent. upon his fees, and that the apportionment made by the trustees in this case was erroneous in this respect. The trustees are to make out the tax list of every district tax voted, and the amount of such tax payable by each inhabitant is to be set opposite his name. The warrant is to direct the collector to collect the sums in such list, with (that is, in addition) five cents on each dollar thereof for his fees. This percentage he is entitled to only on condition of collecting and paying it over; if he does not collect the tax, in certain cases the trustees may sue for and recover it; but surely they are not entitled to the collector's fees, which would or might be recovered, if the percentage is included in the apportionment.

But conceding this to be error on the part of the trustees, and also that they erred in omitting to insert the names of all the taxable inhabitants, does it follow that they are trespassers? Their duties are

various. Some partake of a judicial and some of a ministerial character, while in others they may be considered as actors or parties. Baker v. Freeman, 9 Wend. 42, 24 Am. Dec. 117. Their acts and proceedings should therefore be tried and tested by principles well settled, which define with precision and justice their duties and responsibilities. The range of their official acts imposed upon them by law embracing these different functions, it is the duty of the court to separate them, and apply to each, as it comes up for consideration, its appropriate principle. The business of these officers is often perplexed and embarrassing, and their conduct, when acting in good faith and within the scope of their powers, should be viewed with indulgence by the court, and deserves the most liberal intendment of the law. The apportionment of the tax voted among the taxable inhabitants is, in my opinion, to a certain extent, in the nature of a judicial act. The trustees are to determine who are and who are not taxable within the provisions of the statute; they are then to apportion to each his share according to the value of his real and personal estate and in some cases they are obliged to fix such value.

Sections 76, 77, 78, page 482, show that the duty of ascertaining the taxable inhabitants is involved in considerable difficulty, and that an error in this respect may arise as well from a misjudgment of the law on the part of these officers as a mistake in fact. They are bound to act, and to exercise their best judgment in the apportionment of the tax; and if they confine themselves within the limits of the statute, though they may err in point of law or in judgment, they should not be either civilly or criminally answerable, if their motives are pure. This is the rule applicable to public officers, bound to exercise their deliberative judgments in the discharge of their official duties, and is applicable to all inferior magistrates, and others called to the performance of functions in their nature and character judicial, while acting within their jurisdiction and the scope of their powers. The liabilities and immunities of these officers were examined by the Chief Justice in Cunningham v. Bucklin, and the principles upon which they are held personally liable for official errors correctly stated. 8 Cow. 184, 18 Am. Dec. 432, and cases there cited.

The plaintiff below was not without his remedy (1 Rev. St. 487, §§ 110, 111); and the amendment of the law, 20th April, 1830, provides that any person conceiving himself aggrieved in consequence of any decision made by the trustees of any district in paying any teacher, or concerning any other matter under the present title (which includes the whole of the school act), may appeal to the superintendent of common schools, whose decision shall be final. This provision was intended for what it practically is, a cheap and expeditious mode of settling most, if not all, of the difficulties and disputes arising in the course of the execution of the law. A common-law certiorari would no doubt lie from this court to the trustees, to bring up and correct any erroneous proceeding not concluded by an adjudication

of the superintendent, or in a case where his powers were inadequate to give the relief to which the party was entitled.

I admit the soundness of all the principles relied on in the argument of the defendant in error, namely, that when a special power is granted by statute affecting the property of individuals, it must be strictly pursued, and appear to be pursued on the face of the proceedings; that when a statute confers a new power upon justices of the peace, they must proceed in the mode prescribed by the statute; that inferior jurisdictions, not proceeding according to the course of the common law, are confined strictly to the authority given them, and can take nothing by implication, but must show their power expressly given in every instance. Gilbert v. Columbia Turnpike Co., 3 Johns. Cas. 107; Bigelow v. Stearns, 19 Johns. 42, 10 Am. Dec. 189; Jones v. Reid, 1 Caines, 594. These are wholesome principles, and should never be overlooked in determining the duties or reviewing the proceedings of subordinate tribunals.

But what is the remedy? Does every departure from the statute, or error in the course of the proceedings under it, necessarily make the officer and all concerned trespassers? Clearly not. Where the party or inferior magistate, or any one acting in that character, extends the power of the court or statute to a case to which it cannot be lawfully extended, they become trespassers, and are amenable to the party aggrieved as such. Suydam & Wyckoff v. Keys, 13 Johns. 444, is an illustration of this principle. There the trustees of a school district apportioned a tax, and directed the collector in the warrant to collect it from the plaintiffs, who were not liable to be taxed in the district, and it was correctly held that, so far as the trustees were concerned, they had no jurisdiction, and were trespassers. I agree with Judge Marcy, in Savacool v. Boughton, 5 Wend. 177, 21 Am. Dec. 181, that the decision in that case, subjecting the collector as a trespasser, cannot be supported; but there can be no doubt the trustees were trespassers upon established principles.

Where the magistrate or officer has jurisdiction of the subject-matter, and errs only in the exercise of it, his acts are not void, but voidable, and the only remedy is by certiorari or writ of error. The books are full of illustrations of this principle. Henderson v. Brown, 1 Caines, 90, 2 Am. Dec. 164, is one. There it was held by a majority of the court that an error by the assessors, under the act of Congress of 19th July, 1798, in assessing the new theater in the city of New York as a dwelling house, did not subject the collector as a trespasser for entering and collecting the tax, on the ground that the assessors had jurisdiction of the subject-matter, and the error was one of judgment in the lawful exercise of it. Thompson and Radcliff, Justices, dissented, and held the assessors and collector liable, contending the former had exceeded their authority in making the assessment. The doctrine of the majority of the court has been since repeatedly recognized and applied. In Butler v. Potter, 17 Johns.

145, it was held, where a justice has no jurisdiction whatever, and undertakes to act, his acts are coram non judice and void; but if he has jurisdiction, and errs in the exercise of it, his acts are voidable only. Griffin v. Mitchell, 2 Cow. 548; Colvin v. Luther, 9 Cow. 64. I may add, the case of Henderson v. Brown is an authority to show that the proceedings of the trustees in making the assessment in this case are quasi judicial.

Without pursuing the examination further, I am satisfied trespass will not lie against the defendants below, and the judgment of the common pleas should be reversed.[20] * * *

Judgment reversed.[21]

DOWNER v. LENT.

(Supreme Court of California, 1856. 6 Cal. 94, 65 Am. Dec. 489.)

Appeal from the superior court of the city of San Francisco.

The complaint sets forth that the plaintiff was duly appointed and qualified as a pilot for the port of San Francisco on June 17, 1854; that on the 27th of July following the defendants, who in the meantime had been appointed and qualified as the board of pilot commissioners, and acting as such board, notified plaintiff to surrender his license, and on the 8th of August following published in a San Francisco newspaper the following notice:

"Consignees' Notice.—To Shipmasters and Consignees: Notice is hereby given that Capt. Thomas P. Downer is no longer authorized to act as pilot for this port.

"Per order of the Pilot Commissioners.

"August 8, 1854." "James M. Wilson, Secretary.

All of which the complaint, in a second count, alleges was done by defendants wrongfully and maliciously, and with knowledge of plaintiff's rights, with intention to injure plaintiff and to deprive him of the benefits and emoluments of his franchise, and to his damage and injury in the sum of $2,500, for which sum he prays judgment.

No malice is averred in the first count. The defendants demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action—specifying, among other grounds of objection, that the defendants were not liable in their individual capacity for the exercise of their discretion as a board of pilot commissioners, and that it appeared by the complaint that the acts complained of were done by defendants as such board.

[20] The rest of the opinion is omitted.

[21] Compare Mygatt v. Washburn, 15 N. Y. 316 (1857), and Dorn v. Backer, 61 N. Y. 261 (1874), cited and commented on in McLean v. Jephson, 123 N. Y. 142, 25 N. E. 409, 9 L. R. A. 493 (1890), post, p. 556; also, Rooke v. Withers, 5 Coke Rep. 99b (1598); Stetson v. Kempton, 13 Mass. 272, 7 Am. Dec. 145 (1816), post, p. 334.

The demurrer was overruled, and the defendants answered. The cause was tried before a jury, who found a verdict for the plaintiff for $2,000. Defendants moved for a new trial, which was denied, and judgment entered upon the verdict. Defendants appealed.

The opinion of the court was delivered by Mr. Justice HEYDENFELDT. Mr. Chief Justice MURRAY and Mr. Justice TERRY concurred.

It is beyond controversy that the power of the board of pilot commissioners is quasi judicial, and they are not civilly answerable. They are public officers to whom the law has intrusted certain duties, the performance of which requires the exercise of judgment. They are unlike a ministerial officer, whose duties are well defined, and who must fail to execute them properly at his own peril.

Whenever, from the necessity of the case, the law is obliged to trust to the sound judgment and discretion of an officer, public policy demands that he should be protected from any consequences of an erroneous judgment.

The court erred in refusing to sustain the demurrer to the declaration, and the judgment is reversed.

GILLESPIE v. PALMER.

(Supreme Court of Wisconsin, 1866. 20 Wis. 544.)

DOWNER, J.[22] * * * It is contended by the respondents that the complaint is defective because it does not aver malice on their part in rejecting the vote. Chapter 7, Rev. St., prescribes the duties of the respondents as inspectors, and they are, in substance, that it shall be the duty of each inspector to challenge every person offering to vote, whom he shall know or suspect not to be duly qualified as an elector. One of the inspectors may then administer to the person offering to vote an oath that he will truly answer such questions as shall be put to him touching his residence and qualifications as an elector. If the person refuse to take the oath, or to answer any of the questions put to him, his vote is to be rejected; but if he take the oath and answer the questions, however false may be his answers, and however clearly they may show that he has no right to vote, and he still insists upon voting, it is their duty to tender to him the oath prescribed in section 36 of the act,[23] and, if he takes it, to receive his vote. If he swears falsely, or votes without the requisite qualifications, he may be, on conviction, punished. But if he takes the oaths, and answers the

[22] Only a portion of the opinion is printed.

[23] The oath is to the effect that the person is 21 years of age, that he is a citizen of the United States, or has declared his intention, etc., that he has resided in the state one year next preceding the election, that he is a resident of the town or ward as the case may be, that he has not voted at the election, and has not made, or become interested in, any bet or wager depending upon the result of the election.

questions put, there is no discretion with the inspectors. They are mere ministerial officers; certainly far from being judicial. The registry act provides in substance that any one may have his name registered as a voter upon taking the same oaths and giving the same information required for voting.

If the inspectors are mere ministerial officers, then we see no good reason why the general principle of law, that a ministerial officer is liable for a wrong done by him acting in his official character, though without malice, should not be applied. It is held otherwise, however, in England, in New York, and some other states. The reason of these decisions appears to be that the inspectors of elections are intrusted with a discretionary authority, and are quasi judicial officers. In Massachusetts and Ohio it is held the action will lie without malice. Lincoln v. Hapgood, 11 Mass. 350; Blanchard v. Stearns, 5 Metc. (Mass.) 298; Harris v. Whitcomb, 4 Gray (Mass.) 433; Jeffries v. Ankeny, 11 Ohio, 373; Anderson v. Millikin, 9 Ohio St. 568. Some of these decisions are based partly on the state statute law regulating elections, as being different from the English law, but mainly upon the necessity of protecting the highly valued privilege of voting when the law has provided no other remedy. We adopt the rule of these decisions.[24]

McCORD v. HIGH.

(Supreme Court of Iowa, 1868. 24 Iowa, 336.)

The petition of plaintiff shows that he is the owner of certain lands in Black Hawk county, through which a certain stream of water called Spring creek flows; that the stream, in its natural channel, meanders through plaintiff's land and flows off it near where it enters thereon; that a public highway crosses the stream at its entrance upon plaintiff's land; that defendant, acting as road supervisor, "willfully and maliciously intending to injure the property of plaintiff," erected across said creek, in said highway, a certain obstruction whereby a great portion of the water in said stream was diverted from its natural channel and caused to flow in an artificial channel away from the land of petitioner, which was used as a pasture; that plaintiff, in order to confine said stream to its natural channel, filled up said artificial channel, but the defendant did "willfully, maliciously and fraudulently" cause said artificial channel to be opened, and enlarged the same so that the water would be diverted from the natural channel; that, on account of said obstruction erected by defendant, the greater part of the water is diverted to said artificial channel, which by the action of the

[24] Accord: Elbin v. Wilson, 33 Md. 135 (1870).

As to refusal to perform ministerial duty, see Amy v. Supervisors, 11 Wall. 136, 20 L. Ed. 101 (1870), post, p. 432; Strickfaden v. Zipprick, 49 Ill. 286 (1868).

water is becoming deeper and wider, and through which, in the course of time, all the water of said stream will flow, unless said obstruction erected by defendant shall be removed. The water, so diverted, does not flow at all on plaintiff's land, but re-enters the stream at a point not upon the same.

The defendant sets up as a defense that he was the road supervisor of the district; that "in good faith, and according to his best judgment, he caused said highway to be repaired" in the best manner he was able, with the amount of means at his disposal, "in order to make the same" passable for the public; that no obstruction was erected across said stream by him, and that no diversion was caused in the flow of the stream; and denies the injury complained of by plaintiff. * * *

On motion of defendant, the court instructed the jury as follows, plaintiff excepting thereto: (1) That if the defendant, acting in the discharge of his duties as road supervisor, made the obstruction complained of, he is not liable therefor, unless the act was done maliciously and without probable cause; and that malice must be shown affirmatively. (2) That a public officer is not liable for errors of judgment; that the public have claims upon him, and he is obliged to act, and unless his acts are clearly malicious, and with the intention to injure another, he is not liable therefor.

Under these instructions the jury rendered a verdict for defendant. Plaintiff moved for a new trial on the ground that the law had been incorrectly given to the jury. The motion was overruled, and plaintiff appeals.[25]

Dillon, C. J. I have had in my own mind so much difficulty respecting the main question in this case, viz., the personal responsibility of the road supervisor, that I desire to state briefly why I assent to a reversal of the judgment of the district court. If the act of the supervisor which caused the injury were malicious, I should, of course, entertain no doubt as to his liability.

But the doubt I have had respects his liability for injuries not willfully or maliciously caused by him. That the road supervisor is exempt from liability for certain mistakes of judgment, honestly made in the performance of his official duties, I have no question. If his acts be not strictly judicial, they are in certain cases (as, for example, the kind of a bridge he will build or the requisite capacity of a culvert) in the nature of judicial acts, and rest to some extent upon the same principle. The supervisor is bound to accept his office or be fined. He is bound to exercise his judgment as to the kind of improvements he will make; and this may be influenced by the extent or amount of means or resources at his command. He may not in many cases be able to execute his best thought or judgment. To a certain extent, he must be free to exercise his judgment without being liable to have

[25] The statement is abridged, and the opinion of Beck, J., is omitted.

an action brought against him if his judgment should in a particular case turn out to be faulty.

But private rights of property are also to be respected. A very old and just maxim of the law is that, where there is a wrong, there is a remedy. The law recognizes, as is very correctly stated in the opinion of Mr. Justice BECK, as high a right of property in the water course as in the soil. If an individual obstructs or diverts a water course, the injury is actionable. So it is if done by a municipal corporation. Whether the public officers of such corporation, who do the work which occasions the damage in the course of their official duties, are also liable, admits, in my mind, of more doubt.

The injury of which the plaintiff complains is actionable in its character; but against whom shall the action be brought?

It cannot be brought against the road district of which the defendant is supervisor, because, as was settled in White v. Road District, 9 Iowa, 202, the road district is not, under our statute, liable to be sued as a quasi corporation or otherwise. For the same reason, it cannot be brought against the township.

And it would seem that under the decisions of this court (Wilson v. Jefferson Co., 13 Iowa, 182; Brown v. Jefferson Co., 16 Iowa, 339; McCullom v. Black Hawk Co., 21 Iowa, 409; Bell v. Foutch, 21 Iowa, 129) the bridge or culvert in question, not being built by the county officers or by direction of the county authorities, so far as shown by the record, the county would not be liable for the injury the plaintiff sustained from the obstruction or diversion of the water course.

So, that, although the injury done the plaintiff is a direct invasion of his rights of property, and actionable in its nature, he is without remedy, unless it be against the defendant. In such a case, upon principles of justice, the action should, I think, be held to lie against the public officer.

And the principle involved in this holding, and which, upon the whole, I believe to be sound, is this: That where a public officer, other than a judicial one, does an act directly invasive of the private rights of others, and there is otherwise no remedy for the injury, such officer is personally liable, without proof of malice and an intent to injure. If this is so, the court erred in its instructions to the jury, and its judgment must be reversed.

Whether the supervisor would be liable if the plaintiff had a remedy against the road district, township or county, I give no opinion.

The discretion which protects such an officer as the road supervisor stops at the boundary where the absolute rights of property begin. Suppose the plaintiff had a mill upon the stream, would it do to hold that the road officers could, if they saw fit or judged best, entirely obstruct or essentially diminish the water?

I think not. And this view has the merit of protecting the rights

of property without, as I think, placing these officers under any oppressive responsibility. Cases without merit against an officer who had simply erred in judgment would not meet with any favor from either courts or juries.

Reversed.[26]

LOWE v. CONROY.

(Supreme Court of Wisconsin, 1904. 120 Wis. 151, 97 N. W. 942, 66 L. R. A. 907, 102 Am. St. Rep. 983.)

Appeal from circuit court, Clark County.

Action by Jesse Lowe against T. F. Conroy. From a judgment for plaintiff, defendant appeals. Affirmed.

Respondent was engaged in the business of conducting a meat market in the city of Neillsville. Appellant is a physician residing there, and was the city physician and health officer. On August 3, 1901, a steer of respondent's herd of cattle on his farm was found sick

[26] Accord: Beyer v. Tanner, 29 Ill. 135 (1862). Tearney v. Smith, 86 Ill. 391 (1877). But see, Huey v. Richardson, 2 Har. (Del.) 206 (1837).

"It was held in Graves v. Otis, 2 Hill (N. Y.) 466, that trustees of a village did not acquire jurisdiction to cut down a street when the petition, which the statute required to be signed by a majority of those liable to be assessed for the work, had been altered after it was signed by two of the signers, and made to embrace the sidewalk in question—there not being a majority without the two who signed before the alteration. This alteration might or might not be such as to attract the attention of the trustees; and if it did, they had no means of ascertaining when it was made, except by calling upon each of those signing—a duty which ought not to be imposed upon officers who act without compensation. It was said, if not decided, in People v. Commissioners of Highways of Seward, 27 Barb. (N. Y.) 94, that commissioners of highways did not acquire jurisdiction to lay out a highway unless all of the twelve persons signing the petition were freeholders. In this case, again, the statute makes no provision by which the commissioners can ascertain whether the signers are or are not freeholders. The conveyance, if to any one or more of them, may not be on record, or, if on record, may not in law and in fact convey a freehold estate. Is it just that commissioners should be required at their peril to ascertain the nature of the estate of each petitioner? If, in such case, there is a want of jurisdiction, the proceeding should be reversed or annulled. But the officer should not be held to be a trespasser, unless he knows or has reason to know that he is acting without jurisdiction. In other words, the proceedings are assailable for want of jurisdiction in a proceeding brought to review or reverse them, but are not assailable for want of jurisdiction, in an action against the officer, or other collateral proceeding." Porter v. Purdy, 29 N. Y. 106, 110, 111, 112, 113, 86 Am. Dec. 283 (1864).

See Daniels v. Hathaway, 65 Vt. 247, 254, 26 Atl. 970, 972 (21 L. R. A. 377) (1893): "In view of the fact that selectmen may be required to serve without compensation, their varied and uncertain duties, the duties imposed upon other officers, and the statutes and authorities above cited, it is clear that it is not the duty of selectmen, nor is it intended, that in the performance of their official duties in respect to highways they shall superintend, in person, the construction or repair thereof, or become laborers or operatives thereon. In matters relating to highways they act as a board, and their duties are to a certain extent judicial, or quasi judicial. It is their duty to seek information as to the existence or nonexistence of certain facts, form a judgment, and act accordingly. They are to determine whether other officers have refused or neglected to perform their duty. If they find they have not, it is not their

from an ailment unknown to him, but supposed to have resulted from drinking water containing paris green. He called Dr. Brown, a veterinary surgeon, who gave the steer an antidote for paris green poisoning, but upon further examination informed respondent he believed the steer was afflicted with anthrax, and that another animal of the herd showed symptoms of anthrax. The steer died about 8 o'clock in the evening of the same day. Respondent and his son flayed him, then buried the carcass, and placed the hide on others in the basement of his meat market. Dr. Roberts, the state veterinarian, arrived at Neillsville the following morning, and with respondent visited the place where the steer had died. Dr. Roberts procured some blood from the spot pointed out by respondent as the place where the steer had been flayed. This specimen of blood was mounted on microscopic slides by appellant's brother, a doctor at Neillsville, who examined it microscopically, and concluded it contained the bacilli of anthrax. The same slide was thereafter examined microscopically by Dr. Russell, the state bacteriologist, who reported to appellant that, so far as could be ascertained from the ex-

duty to order repairs; but if they find there has been a refusal or neglect on the part of other officers, or an absence of other officers, it is their duty to determine what repairs are necessary, where they are most needed, where the means at their command can be most judiciously expended, what dangers ought to be guarded against, determine whether there are insufficiencies, and, if they find there are, to adopt plans for building or repairing the same, award contracts for the work, or order the same repaired upon the credit of the town. The performance of these duties requires the exercise of judgment, and for the exercise of this judgment, or an omission to exercise such judgment as some other authority may think they ought to have exercised, they are not responsible to an individual. The exercise of these powers is discretionary, to be exercised or withheld according to the judgment of a majority of the board as to what is necessary and proper. Discretionary power is, in its nature, independent, and to make those who wield it liable to be called to account by some other authority is to take away discretion and destroy independence. Discretion to a certain extent implies judicial functions; and when officers act in such a capacity they are not liable to any private person for a neglect to exercise these powers, nor for the consequence of a lawful exercise of them where no corruption or malice can be imputed, and they keep within the scope of their official duties and authority. It is not enough to charge or show that they omitted to act when they ought to have done so, or that their decisions were erroneous. Yealy v. Fink, 43 Pa. 212, 82 Am. Dec. 556; McConnell v. Dewey, 5 Neb. 389; Downer v. Lent, 6 Cal. 94, 65 Am. Dec. 489; Waldron v. Berry, 51 N. H. 136; Stewart v. Southard, 17 Ohio, 402, 49 Am. Dec. 463; Dunlap v. Knapp, 14 Ohio St. 64, 82 Am. Dec. 468; Lynn v. Adams, 2 Ind. 143."

Upon the question of liability for injury resulting from the neglect of official duties, see further, Hover v. Barkhoof, 44 N. Y. 113 (1870), liability for defective highway recognized where there are funds for repair; Bennett v. Whitney, 94 N. Y. 302 (1884); Hathaway v. Hinton, 46 N. C. 243 (1853) (implied recognition by statute); Skinner v. Morgan, 21 Ill. App. 209 (1886); Worden v. Witt, 4 Idaho, 404, 39 Pac. 1114, 95 Am. St. Rep. 70 (1895), with note, liability denied; 1 Beven on Negligence (2d Ed.) p. 398; South v. Maryland, 18 How. 396, 15 L. Ed. 433 (1855), sheriff not liable for default as conservator of the peace, because his duty is only to the public. So State, to Use of Cocking, v. Wade, 87 Md. 529, 40 Atl. 104, 40 L. R. A. 628 (1898). But see Asher v. Cabell, 50 Fed. 818, 1 C. C. A. 693 (1892), and State of Indiana v. Gobin (C. C.) 94 Fed. 48 (1899), duty of sheriff toward person specially placed in his custody.

amination, the specimen disclosed the presence of the bacilli of anthrax. Appellant was absent from Neillsville August 3d and 4th. Dr. Roberts, the state veterinarian, left Neillsville August 4th, giving directions to appellant's brother to have the herd quarantined until his return. He returned August 7th, vaccinated the herd supposed to have been exposed, repeated this treatment August 19th, and then ordered the quarantine of the herd and pasture removed. On Monday morning, August 5th, appellant returned to Neillsville, was informed of these occurrences, held a consultation with the mayor of the city and chairman of the city board of health and the city attorney; later in the day received instructions from the secretary of the state board of health to destroy any hides which had been exposed, and disinfect the shop and premises if exposed to anthrax infection. Upon this and other information obtained by appellant he believed the steer died from anthrax, and that respondent's shop and some hides and beef in respondent's slaughter house had been exposed to this dangerous and infectious disease. He issued a written order August 5th, and directed Dr. Brown, as deputy health officer, to serve it on respondent. This order notified and directed respondent to remove the hides from the basement of his premises, and destroy them, and the beef of a heifer which respondent and his son had butchered and prepared for the market on the morning after flaying and burying the diseased steer was also to be destroyed. This heifer was the same animal that Dr. Brown had pointed out to respondent as having symptoms of anthrax. Respondent refused to comply with this order, and thereafter on the same day the hides and beef were burned under the supervision of the city mayor, pursuant to the order of August 5th.

It appears that anthrax is one of the most virulent and deadly diseases known to science, and infectious and epidemic in character to a high degree. Upon the trial the court found that appellant acted in good faith in the discharge of what he deemed his duty as city physician and health officer; that he quarantined respondent's meat market premises; that he had good cause to believe the basement of the premises was a source of filth and sickness; that he ordered the destruction of the hides and beef which he believed had been exposed to the infection, and that this property was of a value of $239.70. The jury found that the steer was not in fact afflicted with any dangerous and contagious disease, and that appellant had no probable cause to believe that the steer was so afflicted. The court ordered judgment in respondent's favor, and awarded him judgment for the value of the hides and beef and for costs. This is an appeal from that judgment.

SIEBECKER, J. (after stating the facts). The appellant, as a health officer of the city of Neillsville, seeks to justify the destruction of respondent's property upon the authority vested in the board of health for the adoption of such measures to abate nuisances and remove

sources of filth and causes of sickness as may be deemed most effectual to preserve the public health. By section 1411, Rev. St. 1898, it is provided that every town, village, and city board of health "may take such measures and make such rules and regulations as they may deem most effectual for the preservation of the public health. They may appoint as many persons to aid them in the execution of their powers and duties as they may think proper, * * * examine into all nuisances, sources of filth and causes of sickness and make such rules and regulations respecting the same as they may judge necessary for the protection of the public health and safety of the inhabitants." Section 1412, Rev. St. 1898, prescribes as a part of the health officer's duty: "Upon appearance of any dangerous or contagious disease in the territory within the jurisdiction of the board of which he is a member to immediately investigate all the circumstances attendant upon the appearance of such disease," and "at all times promptly to take such measures for the prevention, suppression and control of any such disease as may in his judgment be needful and proper, subject to the approval of the board of which he is a member." By section 1414, Rev. St. 1898, boards of health are given authority to order nuisances and causes of sickness removed from private property by the owner or occupant, and upon his refusal or neglect to comply the board may cause its removal, and recover the expense thereof.

The common council of the city of Neillsville by ordinances adopted these provisions as a part of the regulations for the preservation of the public health, and provided for the organization of the board of health, prescribing the duties of the board and its health officer in carrying out the powers and duties imposed by law. Neither the statutes nor the ordinances of the city for the preservation of the public health make provision for a hearing before the board or otherwise of the person charged with maintaining a nuisance, source of filth, or cause of sickness. The board or its members or officers may abate and remove the nuisance, source of filth, or cause of sickness without any such hearing, even though such proceeding necessitates the destruction of private property.

The statutes were unquestionably framed upon the fact that such boards must act immediately and summarily in cases of the appearance of contagious and malignant diseases, which are liable to spread and become epidemic, causing destruction of human life. Under such circumstances it has been held that the Legislature under the police power can rightfully grant to boards of health authority to employ all necessary means to protect the public health, and, if necessary, go to the extent of destroying private property when the emergency demands. Bittenhaus v. Johnston, 92 Wis. 588, 66 N. W. 805, 32 L. R. A. 380; City of Salem v. E. Ry. Co., 98 Mass. 431, 96 Am. Dec. 650; Lawton v. Steele, 119 N. Y. 226, 23 N. E. 878, 7 L. R. A.

134, 16 Am. St. Rep. 813; Id., 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385.

The power to summarily abate nuisances was fully recognized and established as a principle of the common law, upon the ground that the requirement of preliminary formal legal proceedings and a judicial trial would result in defeating the beneficial objects sought to be attained. Within this principle, "quarantine and health laws have been enacted from time to time from the organization of state governments, authorizing the summary destruction of imported cargo, clothing, or other articles by officers designated, and no doubt has been suggested as to their constitutionality." Lawton v. Steele, supra; Sentell v. N. O. & C. Ry. Co., 166 U. S. 698, 17 Sup. Ct. 693, 41 L. Ed. 1169; Hart v. Mayor, 9 Wend. (N. Y.) 571, 24 Am. Dec. 165; Health Dept. v. Rector, 145 N. Y. 32, 39 N. E. 833, 27 L. R. A. 710, 45 Am. St. Rep. 579; Rockwell v. Nearing, 35 N. Y. 308.

The appearance of a malignant and contagious disease in cattle is in its nature such a menace to the public health as to bring it clearly within the class of cases which can only in many instances be effectually dealt with by the destruction of the animals afflicted.

Respondent insists that he has the legal right to recover his damages since the property was not in fact a nuisance, source of filth, or a cause of sickness, as contemplated by the statute for the preservation and protection of the public health. This presents the inquiry whether the determination of the health officers that a nuisance or cause of sickness dangerous to health in fact existed is a final determination, binding upon respondent as owner of the property which the health officer decided must be destroyed in order to abate the nuisance and remove the cause of sickness.

The statute, as stated, makes no provision giving the party proceeded against for such a nuisance or cause of sickness an opportunity to be heard before his property may be destroyed. While such a determination has been held to be a full protection to all persons acting under it in carrying out the purposes of the law—that is, to abate, and, if necessary, destroy, that which is in fact a nuisance or source of danger to health—yet it is no protection for destroying private property which in fact is no such nuisance or source of danger. This is upon the ground that due process of law requires that the owner be given an opportunity to be heard at a trial before his private property be taken and adjudged forfeited for his misconduct, or for the protection of the public health. He cannot be deprived of the right, either before or after such taking of his property, to have a judicial inquiry whether in fact he has forfeited the right to his property by coming within the condemnation of the law. In such cases, where a board of health has summarily destroyed property, the owner may bring his action to recover the damages sustained, if it be found he has been unjustifiably deprived of it.

In the absence of judicial inquiry wherein the owner is given full opportunity to establish that no nuisance or cause of sickness exists as claimed, the board of health cannot declare a thing a nuisance or source of danger to public health which is not so in fact. Their authority to act is bottomed upon the actual existence of the conditions which the statutes declare they may abate or remove. Hutton v. City of Camden, 39 N. J. Law, 122, 23 Am. Rep. 203; Lawton v. Steele, supra; Cole v. Kegler, 64 Iowa, 59, 19 N. W. 843; People ex rel. v. Board of Health, 140 N. Y. 1, 35 N. E. 320, 23 L. R. A. 481, 37 Am. St. Rep. 522; Health Dept. v. Rector, 145 N. Y. 32, 39 N. E. 833, 27 L. R. A. 710, 45 Am. St. Rep. 579, and cases; City of Orlando v. Pragg, 31 Fla. 111, 12 South. 368, 19 L. R. A. 196, 34 Am. St. Rep. 17.

It is urged that no action can be maintained to charge appellant for the value of the property because in ordering its removal and destruction he was in the exercise of his official duty as city health officer. The laws for the preservation of the public health make no provision for the payment of property so destroyed by mistake on the order of health officers. The question then arises, who is liable for the value of this property under the facts and circumstances of this case?

The jury found that the steer was not afflicted with a contagion, and that the beef and hides destroyed were not infected with anthrax. It is clear that the city is not liable under the decisions of this court. In the case of Kempster v. City of Milwaukee, 103 Wis. 421, 79 N. W. 411, it is said: "In carrying out the laws for the preservation of the public health the city is performing a duty which it owes to the whole public as distinguished from a mere corporate duty. It is a duty which it is bound to see performed in pursuance of law as one of the governmental agencies, but not a duty from which it derives special benefit or pecuniary advantage in its corporate or private capacity. Hayes v. Oshkosh, 33 Wis. 314, 14 Am. Rep. 760, and cases cited."

As here indicated, under the laws of this state no liability on the part of a municipality arises for injuries resulting from the acts or default of its officers while performing a duty imposed upon it as a governmental agency for the public at large. Durkee v. City of Kenosha, 59 Wis. 123, 17 N. W. 677, 48 Am. Rep. 480; Folk v. City of Milwaukee, 108 Wis. 359, 84 N. W. 420.

Appellant contends that he is not liable in this action upon the ground that the powers vested in members and officers of a board of health are discretionary in character, and that the duty of determining what are causes of sickness affecting the public health are [is] quasi judicial in character. The acts of appellant, as appears from the above statement of facts, were within the scope of his duty as health officer, and come within the class of quasi judicial acts. It is the

general rule that such officers are not liable in damages to private persons for injuries which may result from their official action done in the honest exercise of their judgment within the scope of their authority, however erroneous or mistaken that action may be, provided there be an absence of malice or corruption. Dillon, Municipal Corporations, § 277, and note; Steele v. Dunham, 26 Wis. 393; Druecker v. Salomon, 21 Wis. 621, 94 Am. Dec. 571; Smith v. Gould, 61 Wis. 31, 20 N. W. 369; Gates v. Young, 82 Wis. 272, 52 N. W. 178.

The facts and circumstances show, however, that respondent's private property rights have been unjustifiably invaded, and that, unless it be that defendant and those who actually committed the trespass in wrongfully destroying his property are liable, he will be remediless in the law. Under such circumstances quasi judicial officers have been held liable to respond in damages upon the ground that the exercise of this discretion is limited by the superior right guarantying to every person immunity from having his private property rights invaded except under the regular course of law, sanctioned by the established customs and usages of the courts. The discretion in which such officers are protected must be limited to the line where their acts invade the private property rights of another, for which invasion the law awards no redress other than an action against the one actually committing the trespass. Hubbell v. Goodrich, 37 Wis. 84; Houston v. State, 98 Wis. 481, 74 N. W. 111, 42 L. R. A. 39; Cubit v. O'Dett, 51 Mich. 347, 16 N. W. 679; Miller v. Horton, 152 Mass. 541, 26 N. E. 100, 10 L. R. A. 116, 23 Am. St. Rep. 850; Pearson v. Zehr, 138 Ill. 48, 29 N. E. 854, 32 Am. St. Rep. 113; McCord v. High, 24 Iowa, 336. The circuit court proceeded upon this principle, and held appellant liable in damages resulting from the destruction of the property, because it was not in fact a nuisance or cause of sickness endangering the public health.

This course is assailed by appellant upon the authority of Fath v. Koeppel, 72 Wis. 289, 39 N. W. 539, 7 Am. St. Rep. 867. This was an action against the defendant, as meat inspector of the city of Milwaukee, for the destruction of a quantity of fish as unwholesome for food. The action was upon the ground that his acts were without authority, but the court held that he had authority to inspect fish, and judge whether they were a proper article of diet, and to destroy them if he found they were unwholesome. It is stated in the opinion: "He is vested with the power to determine the quality and healthfulness of fish in the market, and, if unwholesome or unfit to be eaten, to condemn and destroy them. This is a high and responsible judicial power, * * * and the officer exercising such a power is within the protection of that principle that a judicial officer is not responsible in an action for damages to any one for any judgment he may render, however erroneously, negligently, ignorantly, corruptly, or maliciously he may act or render it, if he acts within his jurisdic-

tion"—citing, among the authorities in support of this proposition, Raymond v. Fish, 51 Conn. 80, 50 Am. Rep. 3.[27]

The decision arose on demurrer, and seems to assume that the fish destroyed were in fact unwholesome, and not a fit article of diet. Under this assumption of fact the decision was in accord with the doctrine that health officers are not liable in damages for destroying property when such property is in fact a source of danger to the public health. The opinion, however, seems to go upon the ground that such quasi judicial officers are under all circumstances absolutely protected from liability to the owner of the property, and are entitled to the same protection as an officer of a judicial tribunal in the discharge of official action within his jurisdiction. This is not the rule established under the adjudications. Upon the authorities cited and the reason advanced therein the rule is: "Inasmuch as the law quite universally protects private property, * * * the judgment or discretion of a quasi judicial officer, though exercised honestly and in good faith, does not protect him where, by virtue of it, he undertakes to invade the private property rights of others, to whom no other redress is given than an action against the officer." Mechem, Public Officers, § 642, and cases cited. In so far as Fath v. Koeppel, supra, is in conflict with this conclusion, it must be deemed overruled. * * *

The evidence adduced fully sustains the findings of the jury. Upon the grounds stated, respondent was entitled to a judgment for the value of the property destroyed.

The judgment of the circuit court is affirmed.[28]

[27] In Raymond v. Fish, 51 Conn. 80, 99, 50 Am. Rep. 3 (1883), an action to recover damages for the removal of brush with oysters growing on it, brought against persons acting under an order of the board of health, Park, C. J., said: "By the common law a party has the right to defend himself from any assailant, even to the taking of life when necessary, and even to the taking of life when not necessary in fact, but apparently so. If life may be protected by destroying life, when apparently necessary, but not so in fact, may not life be protected by destroying property when apparently necessary, though afterwards discovered not so in fact? But it may be said that this right of self-defense comes when the assailed party seems to be driven to the last extremity. So here the justification of the board of health in the destruction of property must come in seemingly extreme cases, where there is reasonable ground to believe that immediate action is necessary for the preservation of the life and health of the inhabitants, and where there is reasonable ground to believe the supposed nuisance to be one in fact. We go no farther in this case than its exigencies require. We leave undecided how far the board of health may go in other cases, where the destruction of property may not seem to require such summary action. It is expressly found in the case that the board acted in good faith throughout these transactions, and in addition thereto such facts are detailed as go to show that they acted with extreme caution. We cannot doubt the constitutionality of the act when rightly considered. It is nothing more or less than a police regulation. The property was not taken for public use within the meaning of the Constitution. It was destroyed for the protection of the public health. * * * We advise judgment for the defendants."

See Whidden v. Cheever, 69 N. H. 142, 44 Atl. 908, 76 Am. St. Rep. 154 (1897).

[28] See, also, Underwood v. Green, 42 N. Y. 140 (1870); Miller v. Horton, 152

SECTION 35.—SAME—AGAINST FEDERAL OFFICERS

TRACY v. SWARTWOUT.

(Supreme Court of United States, 1836. 10 Pet. 80, 9 L. Ed. 354.)

Error to the Circuit Court for the Southern District of New York.

This action was commenced by the plaintiffs in error, in the Superior Court of the City of New York, and on the suggestion of the defendant that the suit was instituted against him for acts done by him under the revenue laws, as collector for the district of the city of New York, and praying that the same should be removed to the Circuit Court of the United States for the Southern District of New York, the cause was so removed to October term, 1833.

The declaration was in trover for certain casks of syrup of sugar cane. * * *[29]

McLEAN, Justice, delivered the opinion of the court.

This case was brought into this court by a writ of error to the Circuit Court of the Southern District of New York. The suit was prosecuted in that court, to recover damages from the defendant, who, as collector of the customs, had refused to allow the plaintiffs to enter and receive the payment of the lawful duties, on certain casks of syrup of sugar cane, which they had imported into the port of New York. It is admitted that the law imposed no more duty on the article than fifteen per cent. ad valorem, although the collector, acting under the instructions of the Secretary of the Treasury, required bond for the payment of the above duty, or, should it be required, a duty of three cents per pound. No bond was given, and the syrup remained in the possession of the collector for a long time, by which means its value was greatly deteriorated. The question for consideration arises out of a bill of exceptions in which the evidence is stated at large, showing the quality of the syrup, the number of gallons imported, and the refusal of the defendant to take bond for the fifteen per cent. ad valorem duty.

It was admitted by the counsel of the plaintiffs that the defendant acted throughout with entire good faith, and under instructions from

Mass. 540, 26 N. E. 100, 10 L. R. A. 116, 23 Am. St. Rep. 850 (1891), post, p. 535.

New York Agricultural Law (1901) § 70a: "The actual appraised value * * * of all animals slaughtered under the provisions of this article [Diseases of Domestic Animals], which shall be found upon a post mortem examination not to have had the disease for which they were slaughtered, unless the same were killed on account of the violation of quarantine regulations, shall be paid to the owners of such animals. * * *"

See New York City Charter 1901 (Laws 1901, c. 466) § 1196, post, p. 358.

[29] The rest of the statement of facts and a portion of the opinion are omitted.

the Treasury Department. The plaintiffs' counsel offered to prove that they were unable to give bonds for duties at three cents per pound, though they did not state that fact to the defendant at the time they offered to make the entry. The court overruled this testimony, and instructed the jury "that, admitting the merchandise in question was only subject to an ad valorem duty of fifteen per cent., yet the circumstances under which the dispute about the rate of duties arose ought not to subject the collector to the payment of more than nominal damages; that the collector was pursuing what he believed to be the true construction of the law, and whatever injury the plaintiffs may have sustained, in not receiving their goods at an earlier day, grew out of their own conduct in not entering the goods in the manner offered by the collector, at fifteen per cent. ad valorem, taking the bond, however, to receive the payment of three cents per pound, if such should be the legal rate of duties demandable, merely placing the case in a situation to have the question judicially decided, as to the rate of duty, no intimation, at the time, being given that it would occasion any inconvenience to the plaintiffs to give the bond so required by the collector." Under this construction, the jury found a verdict for six cents damages and six cents costs.

There can be no doubt that the Circuit Court decided correctly in overruling the evidence of inability in the plaintiffs to give the bond demanded by the defendant. The materiality of this evidence is not perceived; and if it had been material it ought not have been received, unless the fact of inability had been made known to the defendant, at the time the bond was required. * * *

The collector of the customs is a ministerial officer. He acts under the instructions of the Secretary of the Treasury, who is expressly authorized to give instructions, as to the due enforcement of the revenue laws. Do these instructions, when not given in accordance with the law, afford a justification to the collector, or exonerate him from the payment of adequate damages for an injury resulting from his illegal acts? The Circuit Court, in their charge to the jury, did not consider these instructions as a justification to the defendant; and in this they were unquestionably correct. The Secretary of the Treasury is bound by the law; and although, in the exercise of his discretion, he may adopt necessary forms and modes of giving effect to the law, yet neither he nor those who act under him can dispense with, or alter, any of its provisions. It would be a most dangerous principle to establish that the acts of a ministerial officer, when done in good faith, however injurious to private rights and unsupported by law, should afford no ground for legal redress. The facts of the case under consideration will forcibly illustrate this principle. The importers offer to comply with the law, by giving bond for the lawful rate of duties; but the collector demands a bond in a greater amount than the full value of the cargo. The bond is not given, and the property is lost, or its value greatly reduced, in the hands of the

defendant. Where a ministerial officer acts in good faith, for an injury done he is not liable to exemplary damages; but he can claim no further exemption where his acts are clearly against law. The collector has a right to hold possession of imported goods until the duties are paid or secured to be paid, as the law requires. But, if he shall retain possession of the goods, and refuse to deliver them, after the duties shall be paid, or bond given or tendered, for the proper rate of duties, he is liable for the damages which may be sustained by this refusal. * * *

Some personal inconvenience may be experienced by an officer who shall be held responsible in damages for illegal acts done under instructions of a superior; but, as the government in such cases is bound to indemnify the officer, there can be no eventual hardship. The judgment of the Circuit Court must be reversed, and the cause remanded to that court for further proceedings.

Judgment reversed.[30]

ELLIOTT v. SWARTWOUT.

(Supreme Court of United States, 1836. 10 Pet. 137, 9 L. Ed. 373.)

Certificate of division from the Circuit Court for the Southern District of New York.

The suit was originally instituted in the Superior Court of the City of New York, by the plaintiff against the defendant, the collector of the port of New York, and was removed by certiorari into the Circuit Court of the United States.

The action was assumpsit, to recover from the defendant the sum of $3,178, received by him for duties, as collector of the port of New York, on an importation of worsted shawls with cotton borders, and worsted suspenders with cotton straps or ends. The duty was levied at the rate of fifty per centum ad valorem, under the second clause of the second section of the act of the 14th July, 1832, entitled "An act to alter and amend the several acts imposing duties on imports," as manufactures of wool, or of which wool is a component part. The plea of non assumpsit was pleaded by the defendant in bar of the action.

The following points were presented, during the progress of the trial, for the opinion of the judges, and on which the judges were opposed in opinion:[31]

3. Whether the collector is personally liable in an action to recover back an excess of duties paid to him as collector, and by him paid, in the regular and ordinary course of his duty, into the treasury

[30] Compare Averill v. Smith, 17 Wall. 82, 21 L. Ed. 613 (1872).

[31] The first two points, and the part of the opinion relating thereto, are omitted.

of the United States, he, the collector, acting in good faith, and under instructions from the Treasury Department; a notice having been given, at the time of payment, that the duties were charged too high, and that the party paying, so paid to get possession of his goods, and intended to sue to recover back the amount erroneously paid, and a notice not to pay over the amount into the treasury. These several points of disagreement were certified to this court by the direction of the judges of the Circuit Court.

THOMPSON, J., delivered the opinion of the court. * * *

3. The case put by the third point is where, at the time of payment, notice is given to the collector that the duties are charged too high, and that the party paying so paid to get possession of his goods, and accompanied by a declaration to the collector that he intended to sue him to recover back the amount erroneously paid, and notice given to him not to pay it over to the treasury. This question must be answered in the affirmative, unless the broad proposition can be maintained that no action will lie against a collector to recover back an excess of duties paid him, but that recourse must be had to the government for redress. Such a principle would be carrying an exemption to a public officer beyond any protection sanctioned by any principles of law or sound public policy. The case of Irving v. Wilson and Another, 4 T. R. 485, was an action for money had and received, against custom-house officers, to recover back money paid to obtain the release and discharge of goods seized, that were not liable to seizure, and the action was sustained. Lord Kenyon observed that the revenue laws ought not to be made the means of oppressing the subject, that the seizure was illegal, that the defendants took the money under circumstances which could by no possibility justify them, and therefore this could not be called a voluntary payment.

The case of Greenway v. Hurd, 4 T. R. 554, was an action against an excise officer, to recover back duties illegally received; and Lord Kenyon does say that an action for money had and received will not lie against a known agent, but the party must resort to the superior. But this was evidently considered a case of voluntary payment. The plaintiff had once refused to pay, but afterwards paid the money; and this circumstance is expressly referred to by Buller, Justice, as fixing the character of the payment. He says, though the plaintiff had once objected to pay the money, he seemed afterwards to waive the objection, by paying it. And Lord Kenyon considered the case as falling within the principle of Sadler v. Evans, 4 Burr. 1984, which has already been noticed. In the case of Snowden v. Davis, 1 Taunt. 358, it was decided that an action for money had and received would lie against a bailiff, to recover back money paid through compulsion, under color of process, by an excess of authority, although the money had been paid over. The court say the money was paid to [by] the plaintiff, under the threat of a distress;

and although paid over to the sheriff, and by him into the exchequer, the action well lies. The plaintiff paid it under terror of process, to redeem his goods, and not with intent that it should be paid over to any one.

The case of Ripley v. Gelston, 9 Johns. (N. Y.) 201, 6 Am. Dec. 271, was a suit against a collector to recover back a sum of money demanded by him for the clearance of a vessel. The plaintiff objected to the payment as being illegal, but paid it for the purpose of obtaining the clearance, and the money had been paid by the collector into the Branch Bank, to the credit of the Treasurer. The defense was put on the ground that the money had been paid over, but this was held insufficient. The money, say the court, was demanded as a condition of the clearance; and that being established, the plaintiff is entitled to recover it back, without showing any notice not to pay it over. The cases which exempt an agent do not apply. The money was paid by compulsion. It was extorted as a condition of giving a clearance, and not with intent or purpose to be paid over. In the case of Clinton v. Strong, 9 Johns. (N. Y.) 370, the action was to recover back certain costs, which the marshal had demanded, on delivering up a vessel which had been seized, which costs the court considered illegal; and one of the questions was whether the payment was voluntary. The court said the payment could not be voluntary; the costs were exacted by the officer, colore officii, as a condition of the redelivery of the property; and that it would lead to the greatest abuse to hold that a payment, under such circumstances, was a voluntary payment, precluding the party from contesting it afterwards. The case of Hearsey v. Pruyn, 7 Johns. (N. Y.) 179, was an action to recover back toll which had been illegally demanded; and Spencer, Justice, in delivering the opinion of the court, says the law is well settled that an action may be sustained against an agent, who has received money to which the principal had no right, if the agent has had notice not to pay it over. And in the case of Frye v. Lockwood, 4 Cow. (N. Y.) 456, the court adopts the principle that when money is paid to an agent, for the purpose of being paid over to his principal, and is actually paid over, no suit will lie against the agent to recover it back. But the distinction taken in the case of Ripley v. Gelston is recognized and adopted, that the cases which exempt an agent, when the money is paid over to his principal without notice, do not apply to cases where the money is paid by compulsion, or extorted as a condition, etc.

From this view of the cases, it may be assumed as the settled doctrine of the law that, where money is illegally demanded and received by an agent, he cannot exonerate himself from personal responsibility by paying it over to his principal, if he has had notice not to pay it over. The answer, therefore, to the third point, must be that the collector is personally liable to an action to recover back

an excess of duties paid to him as collector, under the circumstances stated in the point, although he may have paid over the money into the treasury. * * *

CARY v. CURTIS.

(Supreme Court of United States, 1845. 3 How. 236, 11 L. Ed. 576.)

This case came up from the Circuit Court of the United States for the Southern District of New York, on a certificate of division in opinion between the judges thereof.

The action was brought in the Circuit Court to recover money paid to Curtis, as collector of the port of New York, for duties. The declaration contained the common money counts, and the defendant pleaded the general issue. The cause was tried at November term, 1842.

The jury found for the plaintiffs, subject to the opinion of the court, among other things:

(1) That the plaintiffs paid the sum of $181.75 to the defendants, on the 3d of July, 1841, for duties on the goods imported as being raw silk.

(2) That the goods on which the duties were demanded and paid were not raw silk, but a manufactured article.

(3) That the money so paid was under a written protest, made at the time of payment.

(4) That the money had been paid into the treasury by the defendant, in the month of July, 1841, and before the commencement of this suit.

Upon the argument of this cause, after verdict, several questions arose, among others the following, viz.:

Whether or not the second section of the act of Congress, approved on the 3d day of March, 1839, entitled "An act making appropriations for the civil and diplomatic expenses of government for the year 1839," was a bar to the action?

On this question the opinions of the judges were opposed.

Mr. Justice DANIEL delivered the opinion of the court.[32] * * *

It has been urged that the clause of the act of 1839[33] declaring

[32] Only a portion of the opinion is printed.

[33] "That from and after the passage of this act, all money paid to any collector of the customs, or to any person acting as such, for unascertained duties, or for duties paid under protest against the rate or amount of duties charged, shall be placed to the credit of the Treasurer of the United States, kept and disposed of as all other money paid for duties is required by law, or by regulation of the Treasury Department, to be placed to the credit of the Treasurer, kept and disposed of; and it shall not be held by said collector or person acting as such, to await any ascertainment of duties, or the result of any litigation in relation to the rate or amount of duty legally chargeable and collectible in any case where money is so paid; but whenever it shall be shown to the satisfaction of the Secretary of the Treasury, that in any case of unascertained duties, or duties paid under protest, more

that the money received shall not be held by any collector to await any ascertainment of duties, or the result of any litigation in relation to the rate or amount of duties legally chargeable and collectible in any case where money is so paid, shows that Congress did not mean to deprive the party of his action of assumpsit against the collector, that litigation of that description was still contemplated, and that the only object of the law was to place the money in dispute in the possession of the Treasurer, to await a decision, instead of leaving it in the hands of the collector. The court cannot assent to this construction. It will be remembered that the two principal cases in which collectors have claimed the right to retain have been those of unascertained duties, and of suits brought, or threatened to be brought, for the recovery of duties paid under protest. It is matter of history that the alleged right to retain on these two accounts had led to great abuses, and to much loss to the public; and it is to these two subjects, therefore, that the act of Congress particularly addresses itself. It begins by declaring that all money received on these accounts shall be paid into the treasury, and then, in order to show that the collector is not the person with whom any claims for this money are to be adjusted, or who is to be held responsible for it, the act proceeds to declare that the money shall not remain in his hands even if the protest is followed by a suit, that, notwithstanding suit may be brought against him, he shall still pay the money into the treasury, and that the controversy shall be adjusted with the Secretary. Congress supposed, probably, that a party might choose to sue the collector, as has been done in this instance; but it does not by any means follow that it was intended to make him liable in the suit, or to give the party the right of recovery against him. * * *

It is contended, however, that the language and the purposes of Congress, if really what we hold them to be declared in the statute of 1839, cannot be sustained, because they would be repugnant to the Constitution, inasmuch as they would debar the citizen of his right to resort to the courts of justice. The supremacy of the Constitution over all officers and authorities, both of the federal and state governments, and the sanctity of the rights guaranteed by it, none will question. These are concessa on all sides. The objection above referred to admits of the most satisfactory refutation. This may be found in the following positions, familiar in this and in most other governments, viz.: That the government, as a general rule, claims an exemption from being sued in its own courts. That although, as being charged with the administration of the laws, it will

money has been paid to the collector, or to the person acting as such, than the law requires should have been paid, it shall be his duty to draw his warrant upon the Treasurer in favor of the person or persons entitled to the overpayment, directing the said Treasurer to refund the same out of any money in the treasury not otherwise appropriated."

resort to those courts as means of securing this great end, it will not permit itself to be impleaded therein, save in instances forming conceded and express exceptions. Secondly, in the doctrine so often ruled in this court that the judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good. To deny this position would be to elevate the judicial over the legislative branch of the government, and to give to the former powers limited by its own discretion merely. It follows, then, that the courts created by statute must look to the statute as the warrant for their authority; certainly they cannot go beyond the statute, and assert an authority with which they may not be invested by it, or which may be clearly denied to them. This argument is in no wise impaired by admitting that the judicial power shall extend to all cases arising under the Constitution and laws of the United States. Perfectly consistent with such an admission is the truth that the organization of the judicial power, the definition and distribution of the subjects of jurisdiction in the federal tribunals, and the modes of their action and authority, have been, and of right must be, the work of the legislature. The existence of the judicial act itself, with its several supplements, furnishes proof unanswerable on this point. The courts of the United States are all limited in their nature and constitution, and have not the powers inherent in courts existing by prescription or by the common law. * * *

We have thus stated, and will here recapitulate, the principles on which the action for money had and received may be maintained. They are these: First. Whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged, by the ties of natural justice and equity, to refund. Secondly. In the case of an agent, where such agent is not notoriously the mere carrier or instrument for transferring the fund, but has the power of retaining, and before he has paid over has received notice of the plaintiff's claim and a warning not to part with the fund. Thirdly. Where there exists a privity between the plaintiff and the defendant. Let the case before us be brought to the test of these rules.

The second section of the act of Congress declares, first, that from its passage all money paid to any collector of the customs for unascertained duties, or duties paid under protest against the rate or

amount of duties charged, shall be placed to the credit of the Treasurer, to be kept and applied as all other money paid for duties required by law; secondly, that they shall not be held by the collector to await any ascertainment of duties, or the result of any litigation concerning the rate or amount of duty legally chargeable or collectible; and, thirdly, that in all cases of dispute as to the rate of duties, application shall be made to the Secretary of the Treasury, who shall direct the repayment of any money improperly charged. This section, as a part of the public law, must be taken as notice to all revenue officers, and to all importers and others dealing with those officers in the line of their duty. There is nothing obscure or equivocal in this law. It declares to every one subject to the payment of duties the disposition which shall be made of all payments in future to collectors; tells them those officers shall have no discretion over money received by them, and especially that they shall never retain it to await the result of any contest concerning the right to it; and that quoad this money the statute has converted those officers into mere instruments for its transfer to the treasury.

With full knowledge thus imparted by the law, can it be correctly understood that the party making payment can, ex æquo et bono, recover against the officer for acting in literal conformity with the law, converting thereby the performance of his duty into an offense, or that upon principles of equity and good conscience an obligation and a promise to refund shall be implied against the express mandate of the law? Such a presumption appears to us to be subversive of every rule of right. The more correct inference seems to be that payment under such circumstances must, ex æquo et bono, nay, ex necessitate, and in despite of objection made at the time, be taken as being made in conformity with the mandate of the law and the duty of the officer, which exclude not only any implied promise of repayment by the officer, but would render void an express promise by him, founded upon a violation both of the law and of his duty. The claimant had his option to refuse payment. The detention of the goods for the adjustment of duties being an incident of probable occurrence, to avoid this it could not be permitted to effect the abrogation of a public law, or a system of public policy essentially connected with the general action of the government. The claimant, moreover, was not without other modes of redress, had he chosen to adopt them. He might have asserted his right to the possession of the goods, or his exemption from the duties demanded, either by replevin, or in an action of detinue, or perhaps by an action of trover, upon his tendering the amount of duties admitted by him to be legally due.

The legitimate inquiry before this court is not whether all right of action has been taken away from the party, and the court responds to no such inquiry. The question presented for decision, and the only question decided, is whether, under the notice given by the

statute of 1839, payments made in despite of that notice, though with a protest against their supposed illegality, can constitute a ground for that implied obligation to refund, and for that promise inferred by the law from such obligation, which are inseparable from, and indeed are the only foundation of, a right of recovery in this particular form of action. And here is presented the answer to the assertion that by the act of 1839, or by the construction given to it by this court, the party is debarred all access to the courts of justice, and left entirely at the mercy of an executive officer. Neither have Congress nor this court furnished the slightest ground for the above assertion. * * *

Mr. Justice STORY (dissenting). * * * An action for money had and received being [then] the known and appropriate remedy of the common law, applied to cases of this sort, to protect the subject from illegal taxation, and duties levied by public officers, what ground is there to suppose that Congress could intend to take away so important and valuable a remedy, and leave our citizens utterly without any adequate protection? It is said that circuitously another remedy may be found. The answer is that, if Congress have taken away the direct remedy, the circuitous remedy must be equally barred. But in point of fact no other judicial remedy does exist or can be applied. If the collector is not responsible to pay back the money, nobody is. The government itself is not suable at all; and certainly there is no pretense to say that the Secretary of the Treasury is suable therefor. Where then is the remedy which is supposed to exist? It is an appeal to the Secretary of the Treasury for a return of the money, if in his opinion it ought to be returned, and not otherwise. No court, no jury, nay, not even the ordinary rules of evidence, are to pass between that officer and the injured claimant, to try his rights or to secure him adequate redress.

Assuming that the Secretary of the Treasury will always be disposed to do what he deems to be right in the exercise of his discretion, and that he possesses all the qualifications requisite to perform this duty, among the other complicated duties of his office—a presumption which I am in no manner disposed to question—still it removes not a single objection. It is, after all, a substitution of executive authority and discretion for judicial remedies. Nor should it be disguised that, upon so complicated a subject as the nature and character of articles made subject to duties, grave controversies must always exist (as they have always hitherto existed) as to the category within which particular fabrics and articles are to be classed. The line of discrimination between fabrics and articles approaching near to each other in quality, or component materials, or commercial denominations, is often very nice and difficult, and sometimes exceedingly obscure. It is the very case, therefore, which is fit for judicial inquiry and decision, and falls within the reach of that branch of the judicial power given by the Constitution where it is declared

"that the judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties," etc. If then the judicial power is to extend to all cases arising under the laws of the United States, upon what ground are we to say that cases of this sort, which are eminently "cases arising under the laws," and of a judicial nature, are to be excluded from judicial cognizance, and lodged with an executive functionary?

Besides, we all know that, in all revenue cases, it is the constant practice of the Secretary of the Treasury to give written instructions to the various collectors of the customs as to what duties are to be collected under particular revenue laws, and what, in his judgment, is the proper interpretation of those laws. I will venture to assert that, in nineteen cases out of twenty of doubtful interpretation of any such laws, the collector never acts without the express instructions of the Secretary of the Treasury. So that in most, if not in all, cases where a controversy arises, the Secretary of the Treasury has already pronounced his own judgment. Of what use then, practically speaking, is the appeal to him, since he has already given his decision? Further, it is well known, and the annals of this court as well as those of the other courts of the United States establish in the fullest manner, that the interpretations so given by the Secretary of the Treasury have, in many instances, differed widely from those of the courts. The Constitution looks to the courts as the final interpreters of the laws. Yet the opinion maintained by my Brethren does, in effect, vest such interpretation exclusively in that officer.

These considerations have led me to the conclusion that it never could be the intention of Congress to pass any statute by which the courts of the United States, as well as the state courts, should be excluded from all judicial power in the interpretation of the revenue laws, and that it should be exclusively confided to an executive functionary finally to interpret and execute them—a power which must press severely upon the citizens, however discreetly exercised, and which deeply involves their constitutional rights, privileges, and liberties. The same considerations force me, in all cases of doubtful or ambiguous language admitting of different interpretations, to cling to that which should least trench upon those rights, privileges, and liberties, and a fortiori to adopt that which would be in general harmony with our whole system of government.

And this leads me to say that, after the most careful examination of the second section of the act of 1839, c. 82, I have not been able to find any ground to presume that Congress ever contemplated anything contained in that section to be a bar to the present action. I look upon that section as framed for a very different object, an object founded in sound policy and to secure the public interest. It was to prevent officers of the customs from retaining (as the habit of some had been) large sums of money in their hands received for

duties, upon the pretense that they had been paid under protest, and thus to secure in the hands of the officers a sufficient indemnity for all present as well as future liabilities to the persons who had paid them. By this means large sums of money were withheld from the government, and there was imminent danger that severe losses might thus be sustained from the defalcation of those officers, and the public revenue might be thus appropriated to the personal business or speculating concerns of the officers. If actions should be brought and judgment obtained against such officers for the repayment of any of such duties, it was plain that the government would be bound to indemnify them, especially if they had acted under instructions from the Treasury Department. On the other hand, the government, being in possession of the money, would hold it in the meantime as a deposit to await events, and to refund the same if in the due administration of the law it was adjudged that it ought to be refunded. Such, in my judgment, was the object and the sole object of the section, and it seems to me in this view to be founded in a wise protective policy.[34]

[34] See Arnson v. Murphy, 109 U. S. 238, 3 Sup. Ct. 184, 27 L. Ed. 920 (1883): "The common-law right of action to recover back money illegally exacted by a collector of customs as duties upon imported merchandise rested upon the implied promise of the collector to refund money which he had received as the agent of the government, but which the law had not authorized him to exact, which had been unwillingly paid, and which, before payment to his principal, he had been notified he would be required to repay, and involved a corresponding right on his part to withhold from the government, as an indemnity, the fund in dispute. The manifest public inconveniences resulting from this situation induced Congress, by Act March 3, 1839, c. 82, 5 Stat. 348, § 2, to alter the relation between these officers and the United States by requiring them peremptorily to pay into the treasury all moneys received by them officially, without regard to claims for erroneous and illegal exactions. It was provided, however, therein, that the Secretary of the Treasury himself, on being satisfied that, in any case of duties paid under protest, more money had been paid to the collector than the law required, should refund the excess out of the treasury. The legal effect of this enactment, as was held in Cary v. Curtis, 3 How. 236, 11 L. Ed. 576, was to take from the claimant all right of action against the collector, by removing the ground on which the implied promise rested. Congress, being in session at the time that decision was announced, passed the explanatory act of February 26, 1845, which, by legislative construction of the act of 1839, restored to the claimant his right of action against the collector, but required the protest to be made in writing at the time of payment of the duties alleged to have been illegally exacted, and took from the Secretary of the Treasury the authority to refund conferred by the act of 1839. 5 Stat. 349, 727. This act of 1845 was in force, as was decided in Barney v. Watson, 92 U. S. 449, 23 L. Ed. 730, until repealed by implication by Act June 30, 1864, 13 Stat. 214. The fourteenth section of the act last mentioned is, as already cited, in substance the present section 2931 of the Revised Statutes, providing for the appeal to the Secretary of the Treasury, and the sixteenth section, being the present section 3012½, Rev. St., restores to the Secretary of the Treasury the authority to refund moneys paid under protest and appeal, which he shall be satisfied were illegally exacted, originally conferred upon him by the act of 1839. And the provision of the act of 1845, which construed the act of 1839 so as to restore to the claimant the right of action, judicially declared in Cary v. Curtis, supra, to have been taken away by the latter, now appears as section 3011 of the Revised Statutes. It was in force when the present action was brought, and is as follows: 'Any person who shall have made payment under protest and in order to ob-

TEAL v. FELTON.

(Supreme Court of United States, 1851. 12 How. 284, 13 L. Ed. 990.)

Mr. Justice WAYNE delivered the opinion of the court.[35]

This suit was brought in a justice's court to recover from the plaintiff in error the value of a newspaper, received by him as postmaster at Syracuse, which he refused to deliver to the defendant in error to whom it was addressed. The plaintiff in error had charged the newspaper with letter postage, on account of a letter or initial upon the wrapper of it, distinct from the direction. This the defendant refused to pay, at the same time tendering the lawful postage of a newspaper. The postmaster would not receive it, and retained the paper against the will of the defendant. Upon that demand and refusal the suit was brought. The action was trover and the general issue was pleaded. In the course of the trial, when the defendant in error, who was plaintiff in the suit below, was introducing testimony in support of his case, the defendant objected to a further examination of the case by witnesses, upon the ground that the court had not jurisdiction of the case. The objection having been overruled, the trial of the case was continued; and after the plaintiff had proved that he demanded from the defendant the newspaper, tendering the lawful postage, and that the postmaster refused to deliver it to him, he rested his case. * * *

From the evidence in this case, we do not think that the initial or letter upon the wrapper of the newspaper in this case, subjected it, either under the thirteenth or thirtieth section of the act of 1825, to letter postage. * * * This was not a case in which judgment could be used to determine any fact, except by some other evidence than the letter itself. Nor was it one calling for discretion in the legal acceptation of that term in respect to officers who are called upon to discharge public duties. What was done by the postmaster was a mere act of his own, and ministerial, as that is understood to be, distinct from judicial. It could not have been the intention of Congress to put it in the power of postmasters, upon a mere suspicion raised by a single letter or initial, to arrest the transmission of newspapers from the presses issuing them, or when they were mailed by private hands.

tain possession of merchandise imported for him, to any collector or person acting as collector of any money as duties, when such amount of duties was not, or was not wholly, authorized by law, may maintain an action in the nature of an action at law, which shall be triable by jury, to ascertain the validity of such demand and payment of duties, and to recover back any excess so paid. But no recovery shall be allowed in such action unless a protest and appeal shall have been taken as prescribed in section twenty-nine hundred and thirty-one.'"

As to further history, see De Lima v. Bidwell, 182 U. S. 1, 174–180, 21 Sup. Ct. 743, 45 L. Ed. 1041 (1896), post, p. 561, and Act June 10, 1890.

[35] Only a portion of the opinion of Wayne, J., is printed.

This view of the law disposes also of that point in the argument, claiming for the postmaster an exemption from the suit of the plaintiff, upon the ground that he was called upon, in the act which he did, to exercise discretion and judgment. In Kendall v. Stokes, 3 How. 97, 98, 11 L. Ed. 506, will be found this court's exposition upon that subject, with the leading authorities in support of it. The difference between the two must at all times be determined by the law under which an officer is called upon to act, and by the character of the act. It is the law which gives the justification, and nothing less than the law can give irresponsibility to the officer, although he may be acting in good faith under the instructions of his superior of the department to which he belongs. Here the instructions exceed the law, and marks and signs of themselves, without some knowledge of their meaning, and the intention in the use of them, are, as we have said, neither memoranda nor writings. Tracy v. Swartwout, 10 Pet. 80, 9 L. Ed. 354.

But it is said that the courts of New York had not jurisdiction to try the case. The objection may be better answered by reference to the laws of the United States, in respect to the service to be rendered in the transmission of letters and newspapers by mail, and by the Constitution of the United States, than it can by any general reasoning upon the concurrent civil jurisdiction of the courts of the United States and the courts of the states, or concerning the exclusive jurisdiction given by the Constitution to the former.

The United States undertakes, at fixed rates of postage, to convey letters and newspapers for those to whom they are directed, and the postage may be prepaid by the sender, or be paid when either reach their destination, by the person to whom they are addressed. When tendered by the latter or by his agent, he has the right to the immediate possession of them, though he has not had before the actual possession. If then they be wrongfully withheld for a charge of unlawful postage, it is a conversion for which suit may be brought. His right to sue existing, he may sue in any court having civil jurisdiction of such a case, unless for some cause the suit brought is an exception to the general jurisdiction of the court.

Now the courts in New York having jurisdiction in trover, the case in hand can only be excepted from it by such a case as this having been made one of exclusive jurisdiction in the courts of the United States, by the Constitution of the United States. That such is not the case, we cannot express our view better than Mr. Justice Wright has done in his opinion in this case in the Court of Appeals. After citing the second section of the third article of the Constitution, he adds: "This is a mere grant of jurisdiction to the federal courts, and limits the extent of their power, but without words of exclusion or any attempt to oust the state courts of concurrent jurisdiction in any of the specified cases in which concurrent jurisdiction existed prior to the adoption of the Constitution. The

apparent object was not to curtail the powers of the state courts, but to define the limits of those granted to the federal judiciary." [36] We will add that the legislation of Congress, immediately after the Constitution was carried into operation, confirms the conclusion of the learned judge. We find, in the twenty-fifth section of the judiciary act of 1789, under which this case is before us, that such a concurrent jurisdiction in the courts of the states and of the United States was contemplated, for its first provision is for a review of cases adjudicated in the former, "where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity."

We are satisfied that there was no error in the decision of the Court of Appeals in this case, and the same is affirmed by this court.

[36] See Teall v. Felton, 1 N. Y. 537, 546, 49 Am. Dec. 352 (1848): "But the counsel for the plaintiff in error contends that this is a case which the state courts did not hold cognizance of at the adoption of the federal Constitution, for the reason that the Post-Office Department not only never in any manner or at any time pertained to the state or colony, but is entirely the creation of the national statute: that it owes its existence exclusively to the Constitution and national legislature; and hence that the federal judiciary has exclusive jurisdiction in all matters growing out of or pertaining to it. That the post office is a federal institution no one will deny; but it is difficult to perceive how the premises of the counsel sustain the conclusion at which he arrives. The same reason would apply with equal force in case of a suit being brought against a collector of the customs. The present action is one coeval with the common law, to enforce a right to property, alleged to have been wrongfully converted by the defendant. This remedy for a tortious conversion has always been complete in the state courts. It does not follow that, because the defendant may have been acting under a law of Congress in withholding the newspaper, and consequently may defend himself against the alleged conversion, that jurisdiction of the subject-matter is exclusively given or acquired by the federal courts under such law. The plaintiff is not seeking redress under the post-office laws, or attempting to enforce a penalty specifically imposed by them on the postmaster for a fraudulent act pertaining to his official duty. She simply seeks to recover in an appropriate common-law tribunal, competent to afford a remedy, and in a form of action more ancient than the federal Constitution or laws, the value of her property. If the defendant can maintain that by the post-office laws, or any constitutional act of the national legislature, there was no legal conversion, his defense will be complete. But it is an incorrect conclusion that because a law of Congress prescribes the duties of an officer of the federal government, and in a proper case he may thereunder defend his acts, for such reason the state courts are ousted of jurisdiction. Upon the whole, I have no doubt that the justice had jurisdiction in the present case; and, whilst asserting this jurisdiction, I would not be understood as inclined to throw the least obstacle in the way of a successful operation of the general government, or to encourage the exercise of state power having that tendency."

SECTION 36.—SAME—LIABILITY ON OFFICIAL BOND

UNITED STATES v. GRISWOLD et al.

(Supreme Court of Arizona, 1904. 8 Ariz. 543, 76 Pac. 596.)

Action by the United States of America against Albert J. Griswold and others. From an order sustaining a demurrer to the complaints, plaintiff appeals. Reversed.

SLOAN, J. The United States brought suit in the court below against Albert J. Griswold, postmaster at Nogales, Ariz., and L. W. Mix, Edward Titcomb, Theo. Gebler, and Fred. Herrera, sureties upon the official bond of said Griswold as postmaster aforesaid, to recover the sum of $1,863, alleged to have been lost from the mails after the same had been registered and deposited in the post office at Nogales by P. Sandoval & Co. It was alleged in the complaint that the registered package containing this money was stolen from the post office by reason of the negligence of the postmaster. The defendants in the action demurred to the complaint upon the ground that the facts therein stated did not constitute a cause of action in favor of plaintiff and against the defendants. The demurrer was sustained by the trial court, and from this order and ruling of the court the United States has appealed.

The first question presented is: Does the loss of the registered package, occasioned by the negligence of the postmaster, amount to a breach of the bond given by such postmaster, under section 3834, Rev. St. U. S. (U. S. Comp. St. 1901, p. 2610)? This section provides that "every postmaster, before entering upon the duties of his office, shall give bond, with good and approved security, and in such penalty as the Postmaster General shall deem sufficient, conditioned for the faithful discharge of all duties and trusts imposed on him either by law or the rules and regulations of the department." The bond in this instance, given by Griswold, contained the condition required by said section, being in all respects as required by law and the rules and regulations of the Post-Office Department having the effect of law. Section 3926, Rev. St. U. S. (U. S. Comp. St. 1901, p. 2685), authorizes the Postmaster General to establish a uniform system of registration conditioned that the Post-Office Department, or its revenue, should not be liable for the loss of any mail matter on account of its having been registered. It is a part of the duty of the postmaster to safely keep and to transmit the mails, including registered packages, which may be given into his hands as such postmaster. His oath of office requires him to faithfully perform the duties of his office.

It is a general proposition that a public officer, having ministerial duties to perform, is liable for any injury occasioned by him in consequence of his failure to perform his official duty. Raynsford v. Phelps, 43 Mich. 344, 5 N. W. 403, 38 Am. Rep. 189. Thus it has been held that a postmaster is liable in damage for conversion of mail matter at the suit of the person injured. Teal v. Felton, 12 How. 284, 13 L. Ed. 990. It has also been held that a postmaster is liable for the loss of a letter containing money, occasioned by his negligence, at the suit of the sender. Danforth v. Grant, 14 Vt. 283, 39 Am. Dec. 224. If a postmaster can be held responsible in damages for loss of mail matter occasioned by his negligence, it must be for the reason that he has been derelict in his duty as such officer. Such a failure, under the condition of his official bond that he will "faithfully discharge the duties of his office," amounts to a breach of the bond; and in such a case the liability of the principal is the measure of the liability of the surety. All bonds given by government officials are to be construed as though executed and to be performed at Washington, and hence are to be construed according to the rules of the common law, except where these rules have been changed or modified by statute. Cox v. United States, 31 U. S. 172, 8 L. Ed. 359.

At common law suit upon an official bond must be brought and a recovery had in the name of the obligee. There is no congressional statute modifying the common-law limiting the liability of sureties to suits brought by or in the name of the United States, as there is in the case of bonds given by United States marshals. In the latter case there is statutory authority authorizing any person to bring, in his own name and for his sole use, suit on the marshal's bond for a breach of its conditions. Section 784, Rev. St. U. S. (U. S. Comp. St. 1901, p. 607). It follows, therefore, that P. Sandoval & Co. could not maintain a suit on the postmaster's bond in their own name to recover for the loss of the registered package.

Can the United States maintain such a suit? It has been held that a bailee may sue and recover in his own name damages caused to the subject of the bailment through the negligence of a third person. In such case the measure of damages is not limited to the bailee's special interest in the property, but he may recover for all damages, holding the amount so recovered in excess of his own interest in trust for his bailor. Woodman v. Nottingham, 49 N. H. 387, 6 Am. Rep. 526; McGill v. Monette, 37 Ala. 49; Rindge v. Coleraine, 11 Gray, 159. The United States, in this instance, was the bailee and intrusted with the safe-keeping of the registered package deposited by P. Sandoval & Co. Under section 3926, Rev. St. U. S. (U. S. Comp. St. 1901, p. 2685), the sender of first-class registered matter is entitled to be indemnified out of the postal revenues for loss in the mails to the extent of $10 for any one registered pack-

age, or the actual value thereof when that is less than $10. The government, in accepting a registered package, becomes not only the bailee of the sender, but assumes a liability to its bailor by reason of the bailment.

Even should we therefore construe the liability of the sureties in its strictest sense, the government, as a bailee, would have a right to recover to the extent of its special interest, which would be measured by the extent of its liability to the sender of the package. If the government, therefore, has a right to sue to recover the loss it sustains as bailee, under the general doctrine above stated, its recovery cannot be confined to such special interest, but may cover the entire loss sustained both by it and its bailor. Not only so, but we think it is the duty of the United States to protect the public against its own officers even to the extent of enforcing every legal right which it possesses, whether criminal or civil. To hold that the United States may not maintain an action upon the bond of the postmaster for the recovery of the entire loss sustained by the negligence of the postmaster because it was not obligated to return or make good to P. Sandoval & Co. an amount exceeding $10, would be to deny to the latter any redress unless the postmaster be personally responsible to the extent of such loss.

We are convinced that in a case like the one at bar the United States may sue for the benefit of the injured party and recover from the sureties upon the official bond of the postmaster the full amount of such loss, and that it is the clear duty of the government to bring such action. At common law such suits were usually brought "for the use of" or "at the relation of" the injured person. It is not essential, however, that there be any formal declaration of such use; its only purpose being to protect the interest of the beneficiary against the nominal plaintiff. Tedrick v. Wells, 152 Ill. 217, 38 N. E. 625; Clay Fire & Marine Ins. Co. v. Huron Salt & Lumber Mfg. Co., 31 Mich. 346. In the complaint the facts sufficiently show that the United States is suing for the amount of the loss suffered by P. Sandoval & Co. and for their benefit, and it will not be assumed that the government will appropriate the amount recovered to its own use, but it will be assumed that it will perform its duty by paying to P. Sandoval & Co. the amount so recovered.

We hold that the complaint stated a cause of action, and the judgment will therefore be reversed, and the cause remanded for further proceedings.[37]

KENT C. J., and DOAN, J., concur.

[37] See Howard v. United States, 184 U. S. 676, 687, 690, 22 Sup. Ct. 543, 46 L. Ed. 754 (1902).

SECTION 37.—SAME—ACTIONS AGAINST SUBORDINATES

LITTLE v. BARREME.

THE FLYING FISH.

(Supreme Court of United States, 1804. 2 Cranch, 170, 2 L. Ed. 243.)

Appeal from the Circuit Court for the District of Massachusetts.

MARSHALL, C. J., now delivered the opinion of the court.[38]

The Flying Fish, a Danish vessel, having on board Danish and neutral property, was captured on the 2d of December, 1799, on a voyage from Jeremie to St. Thomas, by the United States frigate Boston, commanded by Captain Little, and brought into the port of Boston, where she was libeled as an American vessel that had violated the nonintercourse law. The judge before whom the cause was tried directed a restoration of the vessel and cargo as neutral property, but refused to award damages for the capture and detention, because, in his opinion, there was probable cause to suspect the vessel to be American. On an appeal to the Circuit Court, this sentence was reversed, because the Flying Fish was on a voyage from, not to, a French port, and was, therefore, had she even been an American vessel, not liable to capture on the high seas.

During the hostilities between the United States and France, an act for the suspension of all intercourse between the two nations was annually passed. That under which the Flying Fish was condemned declared every vessel owned, hired, or employed, wholly or in part, by an American, which should be employed in any traffic or commerce with or for any person resident within the jurisdiction, or under the authority, of the French republic, to be forfeited, together with her cargo, the one-half to accrue to the United States, and the other to any person or persons, citizens of the United States, who will inform and prosecute for the same. The fifth section of this act authorizes the President of the United States to instruct the commanders of armed vessels to stop and examine any ship or vessel of the United States, on the high seas, which there may be reason to suspect to be engaged in any traffic or commerce contrary to the true tenor of the act, and if upon examination it should appear that such ship or vessel is bound, or sailing to, any port or place within the territory of the French republic or her dependencies, it is rendered lawful to seize such vessel, and send her into the United States for adjudication.

It is by no means clear, that the President of the United States, whose high duty it is to "take care that the laws be faithfully exe-

[38] The statement of facts is omitted.

cuted," and who is commander in chief of the armies and navies of the United States, might not, without any special authority for that purpose, in the then existing state of things, have empowered the officers commanding the armed vessels of the United States to seize and send into port for adjudication American vessels which were forfeited by being engaged in this illicit commerce. But when it is observed that the general clause of the first section of the act, which declares that "such vessels may be seized, and may be prosecuted in any District or Circuit Court, which shall be holden within or for the district where the seizure shall be made," obviously contemplates a seizure within the United States, and that the fifth section gives a special authority to seize on the high seas, and limits that authority to the seizure of vessels bound, or sailing to, a French port, the Legislature seem to have prescribed that the manner in which this law shall be carried into execution was to exclude a seizure of any vessel not bound to a French port. Of consequence, however strong the circumstances might be which induced Captain Little to suspect the Flying Fish to be an American vessel, they could not excuse the detention of her, since he would not have been authorized to detain her, had she been really American.

It was so obvious, that if only vessels sailing to a French port could be seized on the high seas, that the law would be very often evaded, that this act of Congress appears to have received a different construction from the executive of the United States—a construction much better calculated to give it effect. A copy of this act was transmitted by the Secretary of the Navy to the captains of the armed vessels, who were ordered to consider the fifth section as a part of their instructions. The same letter contained the following clause: "A proper discharge of the important duties enjoined on you, arising out of this act, will require the exercise of a sound and an impartial judgment. You are not only to do all that in you lies to prevent all intercourse, whether direct or circuitous, between the ports of the United States and those of France or her dependencies, where the vessels are apparently as well as really American, and protected by American papers only, but you are to be vigilant that vessels or cargoes, really American, but covered by Danish or other foreign papers, and bound to or from French ports, do not escape you."

These orders, given by the executive, under the construction of the act of Congress made by the department to which its execution was assigned, enjoin the seizure of American vessels sailing from a French port. Is the officer who obeys them liable for damages sustained by this misconstruction of the act, or will his orders excuse him? If his instructions afford him no protection, then the law must take its course, and he must pay such damages as are legally awarded against him; if they excuse an act, not otherwise excusable, it would then be necessary to inquire whether this is a case in which

the probable cause which existed to induce a suspicion that the vessel was American would excuse the captor from damages when the vessel appeared in fact to be neutral?

I confess the first bias of my mind was very strong in favor of the opinion that, though the instructions of the executive could not give a right, they might yet excuse from damages. I was much inclined to think that a distinction ought to be taken between acts of civil and those of military officers, and between proceedings within the body of the country and those on the high seas. That implicit obedience which military men usually pay to the orders of their superiors which indeed is indispensably necessary to every military system, appeared to me strongly to imply the principle that those orders, if not to perform a prohibited act, ought to justify the person whose general duty it is to obey them, and who is placed by the laws of his country in a situation which, in general, requires that he should obey them. I was strongly inclined to think that where, in consequence of orders from the legitimate authority, a vessel is seized with pure intention, the claim of the injured party for damages would be against that government from which the orders proceeded, and would be a proper subject for negotiation. But I have been convinced that I was mistaken, and I have receded from this first opinion. I acquiesce in that of my Brethren, which is that the instructions cannot change the nature of the transaction, nor legalize an act which, without those instructions, would have been a plain trespass.

It becomes, therefore, unnecessary to inquire whether the probable cause afforded by the conduct of the Flying Fish to suspect her of being an American would excuse Captain Little from damages for having seized and sent her into port, since, had she been an American, the seizure would have been unlawful. Captain Little, then, must be answerable in damages to the owner of this neutral vessel, and as the account taken by order of the Circuit Court is not objectionable on its face, and has not been excepted to by counsel before the proper tribunal, this court can receive no objection to it.

There appears, then, to be no error in the judgment of the Circuit Court, and it must be affirmed with costs.[39]

STETSON v. KEMPTON.

(Supreme Judicial Court of Massachusetts, 1816. 13 Mass. 272, 7 Am. Dec. 145.)

Trespass against the defendants, for taking and carrying away the plaintiff's chaise and harness, and converting them to their own use. The plaintiff had died since the last continuance; and upon

[39] See Otis v. Bacon, 7 Cranch, 589, 3 L. Ed. 448 (1813); Tracy v. Swartwout, 10 Pet. 80, 9 L. Ed. 354 (1836); Hendricks v. Gonzalez, 67 Fed. 351, 14 C. C. A. 659 (1895).

motion of his administrator, he was admitted to prosecute the suit, the defendants opposing. The cause was submitted to the determination of the court, upon an agreed statement of facts, in substance as follows:

The defendants were duly chosen and qualified as assessors for the town of Fairhaven for the year 1814, and on the 8th day of October in that year, in pursuance of the duties of their office, assessed upon the inhabitants of said town a tax, amounting in the whole to the sum of $3,719.73, of which sum the plaintiff, being a taxable inhabitant of the town, was assessed the sum of $14.91, for the nonpayment of which tax his chaise and harness were seized and sold by the collector, to whom the said assessment had been committed, and who was duly qualified to execute the duties of that office, the surplus of the proceeds of the sale, over the tax and legal charges, having been paid to the plaintiff.

Of the said sum of $3,719.73, the sum of $1,200 was, at a legal meeting of the inhabitants of said town holden on the 2d of August, 1814, voted to be raised "for the payment of additional wages allowed the drafted and enlisted militia of said town, and other expenditures of defense." At the time when the said sum of $1,200 was so voted to be raised, and when the same was assessed as aforesaid, an open war existed between the United States and Great Britain. The enemy were then on the coast, and in sight of said town; and had made an attempt to land, but retreated. The town was greatly and eminently exposed to their ravages, who were then laying waste and destroying the dwellings and other property of the people situated on the coast; and in the opinion of the inhabitants of the town, it was necessary to raise and expend the said sum of money for the purposes expressed in the vote above recited, and for the immediate protection and defense of the inhabitants of the town, who voted unanimously to raise the same for the said purposes, the plaintiff himself not having been present at said meeting. Not one-half of the said $1,200 was in fact expended for the object stated in the said vote; and the residue, so far as collected, has been applied to the legal and necessary expenses and uses of the town.

If upon these facts the court should be of opinion that the plaintiff was entitled to recover, judgment was to be rendered for him, upon a default of the defendants, and his damages assessed by a jury; otherwise he was to become nonsuit and the defendants recover their costs.

PARKER, C. J.[40] [after stating the opinion of the court that there was no lawful authority to raise the sum in question]. Thus then the general question is disposed of; but it is further relied upon in the defense that the defendants, being in the assessment of taxes authorized by vote servants or ministerial officers, ought not to be subject to an action for the mere execution of an official duty.

[40] Only a portion of the opinion of Parker, C. J., is printed.

It is true that generally executive officers are not liable to actions for the regular execution of precepts apparently lawful, and which come from an authority which has jurisdiction over the subject. But we cannot view assessors in this light. They are not compellable to assess an illegal tax. They may exercise their judgment on the subjects for which the money appears to be voted; and they may refuse to cause the collection to be enforced, if they deem the tax illegal. If they are not liable to an action for causing an arrest, or the seizure of property, for the nonpayment of an illegal tax, it is difficult to find any remedy for an injured citizen in cases of this nature. The constable or collector is not answerable, because he acts in obedience to a warrant under the hands and seals of the assessors, who have jurisdiction over the subject, and authority to assess a tax, and to issue their warrant; and it would be dangerous to vest such officers with a right to question the legality of the proceedings which precede the assessment.

If an action would lie against the town, it could only be for the money actually received into the treasury, which, in most cases of distress, would be but a partial remedy. The assessors must then be answerable, or there will be a defect of justice. In the cases first cited, the action was against the assessors, and no objection was made on that ground; and it may be also remarked that actions have been uniformly sustained against assessors, when a sum has been assessed which was not within the authority of the town to raise.

It is further objected that, as part of the money composing this tax was raised for legal purposes, the assessment must be considered so far legal as to support the warrant issued by the defendants; otherwise they may be held to pay in damages for money which lawfully belonged to the town. But when a part of a tax is illegal, all the proceedings to collect it must be void, as it is impossible to separate and distinguish, so that the act should be in part a trespass and in part innocent.[41] This point may also be considered as settled in the two cases cited; for in both those cases the greater part of the sum assessed was for lawful purposes. Whether the damages may not be diminished by the jury, in proportion to the sum which shall appear to be a lawful subject of taxation, may be considered in the inquiry which is yet to be had by the jury. * * *[42]

Defendants defaulted.

41 On this point, see Colton v. Hanchett, 13 Ill. 615 (1852).

42 See Rev. Laws Mass. c. 12, § 98 (St. 1823, c. 138, § 5): "Assessors shall not be responsible for the assessment of a tax assessed by them in pursuance of a vote for that purpose, certified to them by the clerk or other proper officer of a city, town, or fire district, except for the want of integrity and fidelity on their own part."

See Lincoln v. Worcester, 8 Cush. (Mass.) 55 (1851), post p. 359.

GUPTAIL et al. v. TEFT.

(Supreme Court of Illinois, 1855. 16 Ill. 365.)

Declaration in trespass quare clausum fregit, for breaking and entering a certain close in the town of Hanover, in said county of Cook, situate on section 31, and breaking down, prostrating and destroying 300 rods of fencing, and breaking the boards, rails and posts, and destroying the lumber whereof the same was made, and trampling down the herbage, etc. Damages, $1,000.

Pleas: (1) General issue. (2) The following special pleas:

"And the said defendant, John Guptail, for further plea in this behalf, by leave, etc., says plaintiff actio non, because he says, that the said close in said declaration mentioned, is situate at and within road district number ten (10), in the town of Hanover, in the said county of Cook; that the said town was, at the time when, etc., organized under the act of the General Assembly of the state of Illinois, approved February 17, A. D. 1851, entitled 'An act to provide for township organization'; that on the 10th day of June, A. D. 1854, Andrew Spitser, S. N. Campbell, and Christophe Sohle, were commissioners of highways in said town of Hanover, duly elected and qualified, and then and there, by virtue of their said office, and according to the force of the statute aforesaid, had the care and superintendence of the highways and bridges in said town, with power to lay out new highways, and to regulate and alter pre-existing highways in said town, and cause the same to be repaired, kept open and free from obstructions; that on the said 10th day of June, the said defendant was overseer of highways in said road district number ten (10), in the said town of Hanover, duly chosen and qualified as such; that it then and there became, and was, the duty of this defendant, as overseer of highways, to open new highways, and remove all obstructions to pre-existing highways, within his said district, when thereunto required by the said commissioners of highways; that on the said 10th day of June, the said commissioners of highways made and delivered to this defendant an order, in the words and figures following, to wit:

"'Hanover, June 10, 1854.

"'To John Guptail, Overseer of Road District No. 10, Town of Hanover:

"'Sir: Complaint having been made to the commissioners of highways in and for the town of Hanover, Cook county, that the highway running on the line between the sections thirty (30) and thirty-one (31) is obstructed by a fence owned by Jonathan Teft, Sr., and he having been legally notified to remove the same, and not having complied, you are hereby ordered by the undersigned, commissioners of highways for the town of Hanover aforesaid, to remove, or cause

the same to be removed, said fence within twenty days after the receipt of this order. Andrew Spitser,

" 'Christophe Sohle,

" 'S. N. Campbell,

" 'Commissioners of Highways.'

"And the said defendant avers that the said highway described in said order was the same identical close in the said declaration mentioned, the said close being then and there part and parcel of an inclosed field; and the said defendant further avers that in obedience to said order he did, at the time when, etc., break and enter upon the close in the said order and in the said plaintiff's declaration mentioned, and pull down the said fence of the said plaintiff, and remove the same from off the said close or highway, as he lawfully might do, for the cause aforesaid; and in so doing he, the said defendant, with feet in walking did a little injure the herbage and grass, corn and grain then standing and growing upon the said close, and did a little break the boards, rails and posts of which said fence was erected, doing then and there no unnecessary damage to the said plaintiff, which are the same supposed trespasses in the said declaration mentioned, and this defendant is ready to verify, etc. Wherefore, he prays judgment," etc.[43]

Plaintiff demurred to each of the said special pleas, in which defendants respectively joined.

Interlocutory judgment upon demurrer for plaintiff, general issue withdrawn, jury impaneled assessed the plaintiff's damages, $160. Final judgment.

Error assigned: In sustaining plaintiff's demurrer to the said defendants' pleas.

Cause tried before J. M. Wilson, Judge, and a jury, at February term, 1855.

Caton, J. We are of the opinion that the demurrer to the two special pleas was properly sustained by the court below. They justify the trespass complained of under an order issued by the commissioners of the town of Hanover, directing the defendant Guptail, who was overseer of highways, to open a public highway on the line between sections 30 and 31, in that town, but they nowhere show that there was a legally laid out highway there. Unless there was such highway there, the commissioners of highways had no authority to order a road to be opened. They had no jurisdiction to act in the premises, and their order to the defendant was a simple nullity, conferring upon him no authority whatever. Only in such a case does the statute authorize them to issue such an order. Upon the argument an attempt was made to liken this order to a writ issued by a court of justice, which, if regular upon its face and emanating from a court having authority to issue such writs, is

[43] A special plea by the other plaintiffs in error, inhabitants required to render road labor, is omitted.

a justification to a ministerial officer who executes it, although in fact it is issued in a case not warranting it. In such a case the ministerial officer is not bound to go behind the writ and inquire into the regularity of the previous proceedings. Were the cases analogous, the argument would be conclusive; but they are not. The commissioners of highways do not constitute a court in any sense, although some portion of their duties may be of a judicial character. Yet this is so in a very limited sense, and the duty in question was not of that character. Not only the commissioners themselves, but others who would seek a justification under their orders, must take the responsibility of showing that a case existed which justified them in issuing their order.

This the pleas do not show, and the judgment must be affirmed.

Judgment affirmed.[44]

CHEGARAY v. JENKINS.

(Court of Appeals of New York, 1851. 5 N. Y. 376.)

This action was commenced in the Superior Court of the City of New York to recover damages for the taking of personal property of the plaintiff (Madame Chegaray) by the defendant. The defendant, who was a constable of the city and county of New York, justified the taking by virtue of a warrant issued to him by the receiver of taxes for the city and county of New York for the collection of a tax alleged to have been duly assessed and imposed by the supervisors of that city and county against the plaintiff, and upon certain premises in the city of New York, owned and occupied by the plaintiff, and which were liable to taxation. The circumstances under which the assessment was made and the warrant issued, are stated in the opinion of Chief Judge Ruggles. The plaintiff obtained a verdict and judgment at the Special Term, which on bill of exceptions was reversed at the General Term, and judgment rendered in favor of the defendant. The plaintiff appealed to this court. See 3 Sandf. 409.

RUGGLES, C. J.[45] * * * But there is an insuperable objection to the plaintiff's recovery in this action against the collecting officer. By the act of 1843 (chapter 230) the office of collector of taxes is abolished, and that of a receiver of taxes is created. By article 2 of that act the supervisors are required to cause the assessment rolls of each ward to be delivered to the receiver, with warrants annexed for the collection of the taxes from each person assessed on or before the 25th of September in each year. If the tax remains unpaid to him on the 15th of April following, the receiver is authorized to issue

[44] See, accord, Mill v. Hawker, L. R. 10 Ex. 92 (1875); Shoup v. Shields, 116 Ill. 488, 6 N. E. 502 (1886).

[45] Only a portion of the opinion of Ruggles, C. J., is printed.

his warrant directed to the sheriff or to any constable or marshal of the city and county, commanding him to levy the tax with interest by distress and sale of the goods of the person against whom the warrant is issued, and to pay the same over to the receiver.

The plaintiff's property was assessed by the officers authorized to make assessments in the ward where the property was situated, the assessment was confirmed by the supervisors, the roll and warrant were delivered to the receiver, the tax remained unpaid until after the day mentioned in the statute, and the receiver issued his warrant to the defendant, a constable, for its collection by distress and sale. It is admitted that the warrant was in due form of law. There is no pretense that anything appeared on its face showing a want of authority in the assessors in making the assessment, in the supervisors in confirming it, or in the receiver in issuing his warrant. The warrant, therefore, was a perfect justification to the officer in taking the plaintiff's property. The case of Savacool v. Boughton, 5 Wend. 170, 21 Am. Dec. 181, is conclusive on this point. It was there settled that a ministerial officer is protected in the execution of process, whether the same issue from a court of general or limited jurisdiction, although such court have not in fact jurisdiction of the case, provided it appears on the face of the process that the court has jurisdiction of the subject-matter, and the process in other respects shows no want of authority.

The principle established in the case here cited is applicable to the case before the court. The assessors, in determining whether the plaintiff's property was taxable as a dwelling, or exempt as a seminary of learning, acted judicially and within the sphere of their duty. But being officers clothed with limited powers conferred by statute, their decision on a question in which their own authority to act was involved, was not for all purposes conclusive. The general principle is that the proceedings of magistrates and officers having special and limited jurisdiction must bear on their face the evidence of their jurisdiction, or they will be judged invalid, and that in collateral actions their judgments may be questioned and disregarded, if it appear that in fact they had no authority to act in the given case. Perhaps in the present case, if the defendant had sold the plaintiff's property for the tax in question, the legality of the tax might have been an open question between the plaintiff and the purchaser in an action to recover the property. But the assessors, having the general authority to make assessments for taxation within the ward in which the plaintiff's property was situated, had jurisdiction of the subject-matter of the assessment in question, and the delivery of the assessment roll and warrant to the receiver conferred on him the authority of issuing his warrant to the defendant as one of the constables of the city and county. It was no part of the duty of the defendant, a subordinate officer, to overrule or to dispute the authority of his superiors, unless upon grounds apparent on the face of their man-

date. The law does not give him the means of ascertaining extrinsic facts for this purpose, nor does it attribute to him the capacity for reviewing the assessment on such facts, if they could be ascertained.

The cases of Suydam v. Keyes, 13 Johns. 444, Smith v. Shaw, 12 Johns. 257, and Wise v. Withers, 3 Cranch, 331, 2 L. Ed. 457, so far as they countenance the contrary doctrine, are overruled in Savacool v. Boughton above referred to. The constable must be protected by the law, in the discharge of a duty imposed by law. The plaintiff in this case was not without remedy. Application might have been made in the first instance to the assessors for a review of their assessment (1 Rev. St. p. 393, § 22), and if that failed the supervisors of the city and county of New York were authorized by Act May 2, 1844, c. 250, § 2, to correct any erroneous assessment within six months after the return of the assessment rolls.

Whether the error in this assessment might have been corrected on a certiorari to the assessors, or to the supervisors after having made the proper application to them, without success, for relief, is not material to the present question. The constable cannot be made responsible on the ground that no relief elsewhere can be had.

Judgment affirmed.[46]

SECTION 38.—SAME—ACTION AGAINST SUPERIOR OFFICER

WHITFIELD v. LORD LE DESPENCER.

(Court of King's Bench, 1778. 1 Cowp. 754.)

Action on the case against the Postmaster General on account of the loss of a bank note for £100. sent by the plaintiff in a letter. The bank note had been stolen by a sorter in the post office in London, who had been convicted and executed for the offense.

Lord MANSFIELD.[47] * * * I shall consider this question in two lights: (1) As it stood in the year 1699, before the determination of Lane v. Cotton, 12 Mod. 472. (2) As it stands now, since that determination; and also, what has been done in consequence of that decision. And first as it stood in the year 1699.

The post office, as Mr. Lee has truly said, was first erected during the usurpation, by an ordinance of Cromwell, and afterwards more

[46] Accord: Erskine v. Hohnbach, 14 Wall. 613, 20 L. Ed. 745 (1872); Stutsman County v. Wallace, 142 U. S. 293, 12 Sup. Ct. 227, 35 L. Ed. 1018 (1892); Throop, Public Officers, §§ 756–770.

See, however, Nichols v. Walker & Carter, 4 Cro. Car. 394 (1634).

[47] Only a portion of the opinion of Lord Mansfield is printed.

fully regulated by St. 12 Car. II, c. 35. There never had been action brought, either upon that ordinance or upon the statute, till the case of Lane v. Cotton; and the same mode of action that is now brought was the mode fixed upon in the case of Lane v. Cotton. But neither from the draught of the declaration by the advisers of that action, nor in the opinion of the judges upon the question, does it appear to have entered into the imagination of either that this was a demand upon the fund, as it has been now argued; for the form of action is not applicable to such a demand. If there could be a demand upon the fund, it must be by a totally different form of action. But this is a demand upon the postmaster personally, upon the ground of a neglect in him by his own act, or constructively so, by the fault of his servant. If the fund were in the nature of a policy of insurance, to insure every man, who sends bills or notes by land or sea carriage, from a loss by robbery or neglect, such contingency would be a deduction out of the fund; and no doubt in that case, if a loss were to happen, upon an action brought against the proper officers they would be liable, being bound by the positive constitution of the office to insure every person for the fixed and established rate of postage. But here the act of Parliament has appropriated the whole revenue. Therefore, if a loss is paid, there must be an item of it; and that item must come under the appropriation. But it is manifest no such idea was ever thought of at the time. If it had been thought of, the ordinance of Cromwell, or the act of Parliament, would in terms have charged the fund for all losses arising from neglect or otherwise.

But neither this action, nor the case of Lane v. Cotton, is founded upon the ground of the fund being liable. What then is the ground? It is that the postmaster in consequence of the hire he receives, is liable for all the damage that may happen, whether owing to the negligence or dishonesty of the persons employed under him to conduct and carry on the business of the office. If that position were founded in the extent in which it has been stated, it would go the length of making the defendants liable in all cases whatsoever. But the argument of Lord Chief Justice Holt, who differed from the other judges in the case of Lane v. Cotton, does not extend so far as that; for he takes a difference between the case of a letter lost in the office by a servant employed under the postmaster, and that of a loss upon the road, or by the mail being robbed after the letter has been sent safe out of the office. The ground of Lord Chief Justice Holt's opinion in that case is founded upon comparing the situation of the postmaster to that of a common carrier, or the master of a ship taking goods on board for freight. Now, with all deference to so great an opinion, the comparison between a postmaster and a carrier, or the master of a ship, seems to me to hold in no particular whatsoever. The postmaster has no hire, enters into no contract, carries on no merchandise or commerce. But the post office is a branch of

revenue, and a branch of police, created by act of Parliament. As a branch of revenue, there are great receipts; but there is likewise a great surplus of benefit and advantage to the public, arising from the fund.

As a branch of police, it puts the whole correspondence of the kingdom (for the exceptions are very trifling) under government, and intrusts the management and direction of it to the crown, and officers appointed by the crown. There is no analogy therefore between the case of the postmaster and a common carrier. The branch of revenue and the branch of police are to be governed by different officers. The superior has the appointment of the inferior officers; but they give security to the crown. One requisite is that they shall take the oaths taken by all public officers. Another strong guard is, that they are made subject to heavy penalties; and this is carried so far that what in the case of a common carrier, or any other person, would be only a breach of trust, is in them declared to be a capital felony. All these advantages the law provides for the security of the subject, in consideration of their being obliged to send their letters by this mode of conveyance. But the statute does not make the postmaster liable for any act done, except in one particular case, which is very remarkable, because it makes him liable for his own fault only (and not for that of his deputies), in a case where it is hardly possible for the postmaster himself to be personally in fault. The statute (section 5) creates a monopoly in the postmaster and his deputies or substitutes, of providing post horses. And if any other person presumes to let to hire any post horse, for the purpose of carrying letters, etc., he is liable to a penalty of £5. except where the postmaster or his deputies do not furnish horses within half an hour after an application made; for then the party is at liberty to hire a horse elsewhere. And in that case, "if it be through default or neglect of the postmaster, or his deputy, that such person fail of being furnished with a sufficient horse or horses in time, then the postmaster or his deputies are to forfeit £5."

As to an action on the case lying against the party really offending, there can be no doubt of it; for whoever does an act by which another person receives an injury is liable in an action for the injury sustained. If the man who receives a penny to carry the letters to the post office loses any of them, he is answerable; so is the sorter in the business of his department. So is the postmaster for any fault of his own. Here no personal neglect is imputed to the defendants, nor is the action brought on that ground; but for a constructive negligence only, by the act of their servants. In order to succeed, therefore, it must be shown that it is a loss to be supported by the postmaster, which it certainly is not.

As to the argument that has been drawn from the salary which the defendants enjoy: In a matter of revenue and police under the authority of an act of Parliament, the salary annexed to the office is

for no other consideration than the trouble of executing it. The case of the postmaster, therefore, is in no circumstance whatever similar to that of a common carrier; but he is like all other public officers, such as the lords commissioners of the treasury, the commissioners of the customs and excise, the auditors of the exchequer, etc., who were never thought liable for any negligence or misconduct of the inferior officers in their several departments.

Thus then the question stood in the year 1699. In that year a solemn judgment was given that an action on the case would not lie, against the Postmaster General, for a loss in the office by the negligence or fault of his servant. The nation understood it to be a judgment; and therefore it makes no difference, if what has been thrown out were true, and the writ of error was stopped in the way that has been mentioned. For the bar have taken notice of it as a judgment; the Parliament and the people have taken notice of it; every man who has sent a letter since has taken notice of it; many acts of Parliament for the regulation and improvement of the post office, and other purposes relative to it, have passed since, which by their silence have recognized it. The mail has been robbed a hundred times since, and no action whatever has been brought. What have merchants done since and continue to do at this day, as a caution and security against a loss? They cut their bills and notes into two or three parts, and send them at different times; one by this day's post, the other by the next. This shows the sense of mankind as to their remedy. If there could have been any doubt therefore before the determination of Lane v. Cotton, the solemn judgment in that case, having stood uncontroverted ever since, puts the matter beyond dispute. Therefore, we are all clearly of opinion the action will not lie.

Per Curiam. Judgment for the defendants.

KEENAN v. SOUTHWORTH.

(Supreme Judicial Court of Massachusetts, 1872. 110 Mass. 474, 14 Am. Rep. 613.)

Tort against the postmaster of East Randolph, to recover damages for the loss, by the defendant's negligence, of a letter addressed to the plaintiff. At the trial in the superior court, before Pitman, J., the plaintiff introduced evidence, not now necessary to report, that the letter was received at the post office at East Randolph, and was lost by the negligence or wrongful conduct of one Bird, who was the postmaster's clerk. The plaintiff having disclaimed "any actual participancy or knowledge of the acts of Bird on the part of the defendant," the judge ruled that the defendant was not liable for any careless, negligent or wrongful acts of Bird; and, by consent of the plaintiff, he directed a verdict for the defendant, and reported the

case for the consideration of this court. If the ruling was wrong, the verdict to be set aside, and the case to stand for trial; otherwise, judgment for the defendant on the verdict.

GRAY, J. The law is well settled, in England and America, that the Postmaster General, the deputy postmasters, and their assistants and clerks, appointed and sworn as required by law, are public officers, each of whom is responsible for his own negligence only, and not for that of any of the others, although selected by him, and subject to his orders. Lane v. Cotton, 1 Ld. Raym. 646, 12 Mod. 472; Whitfield v. Le Despencer, Cowp. 754; Dunlop v. Munroe, 7 Cranch, 242, 3 L. Ed. 329; Schroyer v. Lynch, 8 Watts (Pa.) 453; Bishop v. Williamson, 11 Me. 495; Hutchins v. Brackett, 22 N. H. 252, 53 Am. Dec. 248.

The ruling at the trial was therefore right; and the plaintiff, having consented to a verdict for the defendant, reserving only the question of the correctness of that ruling, cannot now raise the question whether there was sufficient evidence of the defendant's own negligence to be submitted to the jury.

Judgment on the verdict.[48]

[48] See Robertson v. Sichel, 127 U. S. 507, 8 Sup. Ct. 1286, 32 L. Ed. 203 (1888), accord.

The liability of certain officers connected with the administration of justice who were paid by fees (especially sheriffs) for their deputies is established by common law and frequently recognized by statute. See Rev. Laws Mass. c. 23, § 1; Rev. St. Ill. c. 125, § 13.

St. Westm. II, 13 Edw. I, c. 11: "And if the keeper of the gaol have not wherewith he may be justified, or not able to pay, his superior, that committed the custody of the gaol unto him, shall be answerable (respondeat superior suus) by the same writ."

Also, 2 Henry VI, c. 10, § 1423: "All the officers made by the King's letters patents royal within the said courts [of our lord the King] which have power and authority by virtue of their offices of old times accustomed to appoint clerks and ministers within the same courts shall be charged and sworn to appoint such clerks and ministers, for whom they will answer at their peril, which be sufficient, faithful, and attending to that which pertaineth to them in performance of the business, as well of the King, as of his people."

See Hazard v. Israel, 1 Bin. (Pa.) 240, 2 Am. Dec. 438 (1808); Campbell v. Phelps, 1 Pick. (Mass.) 62, 66, 11 Am. Dec. 139 (1822); Wood v. Farnell, 50 Ala. 546 (1874); McNutt v. Livingston, 7 Smedes & M. (Miss.) 641 (1846).

The following additional cases in this collection are suits against officers: Grindley v. Barker, 1 Bos. & P. 229 (1798); McCoy v. Curtice, 9 Wend. (N. Y.) 17, 24 Am. Dec. 113 (1832); Meeker v. Van Rensselaer, 15 Wend. (N. Y.) 397 (1836); Johnson v. Stedman, 3 Ohio, 94 (1827); Eldred v. Sexton, 5 Ohio, 216 (1831); Patterson v. Miller, 2 Metc. (Ky.) 493 (1859); Neff v. Paddock, 26 Wis. 546 (1870); Hubbell v. Goodrich, 37 Wis. 84 (1875); Wilcox v. Hemming, 58 Wis. 144, 15 N. W. 435, 46 Am. Rep. 625 (1883); King v. Davenport, 98 Ill. 305, 38 Am. Rep. 89 (1881); Baldwin v. Smith, 82 Ill. 162 (1876); Lawton v. Steele, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385 (1894); Potts v. Breen, 167 Ill. 67, 47 N. E. 81, 39 L. R. A. 152, 59 Am. St. Rep. 262 (1897); Warne v. Varley, 6 T. R. 443 (1795); Thompson v. Farrer, 9 Q. B. D. 372 (1882); Miller v. Horton, 152 Mass. 540, 26 N. E. 100, 10 L. R. A. 116, 23 Am. St. Rep. 850 (1891); De Lima v. Bidwell, 182 U. S. 1, 21 Sup. Ct. 743, 45 L. Ed. 1041 (1901); Gonzales v. Williams, 192 U. S. 1, 24 Sup. Ct. 171, 48 L. Ed. 317 (1904); Martin v. Mott, 12 Wheat. 19, 6 L. Ed. 537 (1827); Amy v. Supervisors, 11 Wall. 136, 20 L. Ed. 101 (1870).

SECTION 39.—ACTIONS AGAINST MUNICIPAL CORPORATIONS—IN TORT [49]

LEVY v. MAYOR, ALDERMEN AND COMMONALTY OF CITY OF NEW YORK.

(Superior Court of City of New York, 1848. 1 Sandf. 465.)

Trespass on the case.

The city of New York, having the requisite power, enacted an ordinance prohibiting swine from running at large in the streets, with a suitable penalty, and a provision for impounding the delinquent animals. The plaintiff's infant son was attacked by a swine straying in the street and was mortally injured.

Demurrer to declaration. * * * [50]

SANDFORD, J. The plaintiff's counsel well observed that there was no precedent for such an action as this, and we are compelled to add that there is no principle upon which it can be sustained.

The corporation is undoubtedly vested with certain legislative powers, among which is the authority to restrain swine from running at large in the streets; and they have exercised it by enacting an ordinance to that effect. The idea, that because they may prohibit a nuisance, that therefore they must not only pass a prohibitory law, but must also enforce it, at the hazard of being subjected to all damages which may ensue from such nuisance, is certainly novel. The corporation of the city in this respect stands upon the same footing within its own jurisdiction as the state government does in respect of the state at large.

It is the duty of the government to protect and preserve the rights of the citizens of the state, both in person and property, and it should provide and enforce wholesome laws for that object. But injuries to both person and property will occur, which no legislation can prevent, and which no system of laws can adequately redress. The government does not guaranty its citizens against all the casualties incident to humanity or to civil society; and we believe it has never been called upon to make good, by way of damages, its inability to protect against such misfortunes.

There would be no end to the claims against this city and state, if such an action as this is well founded. If a man were to be run over, and his leg broken, by an omnibus racing in the street, he would forthwith sue the city for damages, because the corporate authorities

[49] The question of liability for neglect of ministerial duties is not considered. See full review of authorities in Hill v. Boston, 122 Mass. 344, 23 Am. Rep. 332 (1877).

[50] The statement is abridged.

neglected to enforce their ordinance against racing and furious driving in the public streets. So, if some miscreant, by placing a stick of timber on a railroad track, should cause the destruction of a passenger train, with great loss of life and limb, the Legislature would be petitioned by the injured survivors, and the relatives of the deceased, for the damages thereby occasioned, on the ground that the public servants should have enforced the statute enacted against such offenses.

There are innumerable illustrations of the application of the principle. It suffices to say that no government, whether national, state or municipal, ever assumed, or was subjected to, a general liability of this description.

There is no analogy between a municipal corporation in respect of its legislative functions, and the duty or the liability of turnpike companies, or other private corporations aggregate. And the same may be said of the duty of commissioners of highways, and like public officers, clothed with adequate power for the performance of some plain executive or ministerial duty.

As to the argument that the common law imposes upon the corporation the duty and liability in question, we are unable to appreciate it. Nor do we understand that, as a corporation, it is subjected per se to the duty of keeping swine out of the streets.

We have had occasion frequently to hold the city liable for the negligence and misfeasance of its officers and agents; but the principle of that liability has no application here.

Waiving the consideration of the other objections to the action, which are presented by the demurrers, we must decide that the suit cannot be maintained.

Judgment for the defendants.[51]

ASHLEY v. CITY OF PORT HURON.

(Supreme Court of Michigan, 1877. 35 Mich. 296, 24 Am. Rep. 552.)

COOLEY, C. J.[52] The action in this case was instituted to recover damages for an injury caused to the house of plaintiff by the cutting of a sewer under the direction of the city authorities, and under city legislation the validity of which is not disputed. The necessary

[51] See, accord, Hines v. Charlotte, 72 Mich. 278, 40 N. W. 333, 1 L. R. A. 844 (1888); Jones v. Williamsburg, 97 Va. 722, 34 S. E. 883, 47 L. R. A. 294 (1900).

Contra: Cochrane v. Frostburg, 81 Md. 54, 31 Atl. 703, 27 L. R. A. 728, 48 Am. St. Rep. 479 (1895).

As to statutory liability for damage done by mobs, see Darlington v. Mayor, etc., 31 N. Y. 164, 88 Am. Dec. 248 (1865); Chicago v. Manhattan Cement Co., 178 Ill. 372, 53 N. E. 68, 45 L. R. A. 848, 69 Am. St. Rep. 321 (1899).

[52] Only a portion of the opinion of Cooley, C. J., is printed.

result of cutting the sewer, the plaintiff claims, was to collect and throw large quantities of water upon his premises which otherwise would not have flowed upon them; and it is for an injury thereby caused that he sues. The evidence offered on the part of the plaintiff tended to establish the case he declared upon; but the court instructed the jury that, though they should find the facts to be as the plaintiff claimed, they must still return a verdict for the defendant. The ground of this decision, as we understand it, was that the city, in ordering the construction of the sewer and in constructing it, was acting in the exercise of its legislative and discretionary authority, and was consequently exempt from any liability to persons who might happen to be injured. That is the ground that is assumed by counsel for the city in this court, and it is supposed to be the ground on which the case was decided in the court below.

In Pontiac v. Carter, 32 Mich. 164, the question of the liability of a municipal corporation for an injury resulting from an exercise of its legislative powers was considered, and it was denied that any liability could arise so long as the corporation confined itself within the limits of its jurisdiction. That was a case of an incidental injury to property caused by the grading of a street. The plaintiff's premises were in no way invaded, but they were rendered less valuable by the grading, and there was this peculiar hardship in the case, that the injury was mainly or wholly owing to the fact that the plaintiff's dwelling had been erected with reference to a grade previously established and now changed. In the subsequent case of City of Detroit v. Beckman, 34 Mich. 125, 22 Am. Rep. 507, the same doctrine was reaffirmed. That was a case of injury by being overturned in a street in consequence of what was claimed to be an insufficient covering of a sewer at a point where two streets crossed each other. It was counted upon as a case of negligence, but the negligence consisted only in this: That the city had failed to provide for covering the sewer at the crossing of a street for such a width as a proper regard for the safety of people passing along the street would require. If this case is found to be within the principle of the cases referred to, the ruling below must be sustained, and that, we think, is the only question we have occasion to discuss.

The cases that bear upon the precise point now involved are numerous. In Proprietors of Locks, etc., v. Lowell, 7 Gray (Mass.) 223, it was held that a city was liable in an action of tort for draining water through sewers and drains into a canal owned by a private corporation, thereby causing injury to the canal; the conclusion being planted on the right of the corporation "to an unmolested enjoyment of the property." * * *

In Rochester White Lead Co. v. Rochester, 3 N. Y. 463, 53 Am. Dec. 316, the city was made to respond in damages for flooding private premises with waters gathered in a sewer. This case is commented on in Mills v. Brooklyn, 32 N. Y. 489, and distinguished from

one in which the injury complained of arose from the insufficiency of a sewer which was constructed in accordance with the plan determined upon. Obviously the complaint in that case was of the legislation itself, and of incidental injuries which it did not sufficiently provide against. The like injuries might result from a failure to construct any sewer whatever; but clearly no action could be sustained for a mere neglect to exercise a discretionary authority. Compare Smith v. Mayor, etc., 6 Thomp. & C. (N. Y.) 685, 4 Hun, 637; Nims v. Mayor, etc., 59 N. Y. 500.

Cases of flooding lands by neglect to keep sewers in repair, of which Barton v. Syracuse, 37 Barb. 292, and 36 N. Y. 54, is an instance, are passed by, inasmuch as it is not disputed by counsel for the defendant in this case that for negligent injuries of that description the corporation would be responsible. Those cases are supposed by counsel to be distinguished from the one before us in this: That here the neglect complained of was only of a failure to exercise a legislative function, and thereby provide the means for carrying off the water which the sewer threw upon the plaintiff's premises. The distinction is that the obligation to establish and open sewers is a legislative duty, while the obligation to keep them in repair is ministerial. But it is not strictly the failure to construct sewers to carry off the water that is complained of in this case. It is of the positive act of casting water upon the plaintiff's premises by the sewer already constructed.

An action like the one at bar was sustained in Nevins v. Peoria, 41 Ill. 502, 89 Am. Dec. 392, Aurora v. Gillett, 56 Ill. 132, Aurora v. Reed, 57 Ill. 30, 11 Am. Rep. 1, Alton v. Hope, 68 Ill. 167, and Jacksonville v. Lambert, 62 Ill. 519. The same is true of Pettigrew v. Evansville, 25 Wis. 223, 3 Am. Rep. 50, where Dixon, C. J., is at some pains to distinguish the case from one of merely incidental injuries. The case of Vincennes v. Richards, 23 Ind. 381, appears by the report to have turned on this distinction. And see Cotes v. Davenport, 9 Iowa, 227. * * *

It is very manifest, from this reference to authorities, that they recognize in municipal corporations no exemption from responsibility where the injury an individual has received is a direct injury accomplished by a corporate act which is in the nature of a trespass upon him. The right of an individual to the occupation and enjoyment of his premises is exclusive, and the public authorities have no more liberty to trespass upon it than has a private individual. * * *

A municipal charter never gives and never could give authority to appropriate the freehold of a citizen without compensation, whether it be done through an actual taking of it for streets or buildings, or by flooding it so as to interfere with the owner's possession. His property right is appropriated in the one case as much as in the other. Pumpelly v. Green Bay Co., 13 Wall. 166, 20 L. Ed. 557; Arimond

v. Green Bay, etc., Co., 31 Wis. 316; Eaton v. B. C. & M. R. R. Co., 51 N. H. 504, 12 Am. Rep. 147.

A like excess of jurisdiction appears when in the exercise of its powers a municipal corporation creates a nuisance to the injury of an individual. The doctrine of liability in such cases is familiar, and was acted upon in Pennoyer v. Saginaw, 8 Mich. 534. * * *[53]

COHEN v. MAYOR, ETC., OF NEW YORK.

(Court of Appeals of New York, 1889. 113 N. Y. 532, 21 N. E. 700, 4 L. R. A. 406, 10 Am. St. Rep. 506.)

Appeal from Supreme Court, General Term, First Department.

This action was brought by Hannah and Abraham Cohen, as administrators, to recover damages for the death of plaintiffs' decedent, which occurred by reason of a wound in the head caused by the falling of a pair of thills attached to a grocer's wagon upon him while the decedent was walking through one of the streets of the city of New York. Evidence was given on the trial tending to prove the following facts:

On the morning of October 20, 1879, one Pischel Cohen was walking through Attorney street in such city, and at the same time an ice wagon was passing south through that street, and a wagon loaded with coals was coming north through the same street. A grocery wagon, without any horse attached, was standing in front of the grocery store kept by one Marks, who owned the wagon. The thills were tied up in a perpendicular manner with some kind of string; and the length of the wagon was parallel with the length of the street.

[53] Accord: Miles v. Worcester, 154 Mass. 511, 28 N. E. 676, 13 L. R. A. 841, 26 Am. St. Rep. 264 (1891); Huffmire v. Brooklyn, 162 N. Y. 584, 57 N. E. 176, 48 L. R. A. 421 (1900), destruction of oysters by sewage; Platt Bros. v. Waterbury, 72 Conn. 531, 45 Atl. 154, 48 L. R. A. 691, 77 Am. St. Rep. 335 (1900) with notes. Contra: Duncan v. Lynchburg (Va., not officially reported) 34 S. E. 964, 48 L. R. A. 331 (1900); Board of Education of Cincinnati v. Volk, 72 Ohio St. 469, 74 N. E. 646 (1905).

See Johnston v. District of Columbia, 118 U. S. 19, 6 Sup. Ct. 923, 30 L. Ed. 75 (1886): "The duties of the municipal authorities, in adopting a general plan of drainage, and determining when and where sewers shall be built, of what size and at what level, are of a quasi judicial nature, involving the exercise of deliberate judgment and large discretion, and depending upon considerations affecting the public health and general convenience throughout an extensive territory; and the exercise of such judgment and discretion, in the selection and adoption of the general plan or system of drainage, is not subject to revision by a court or jury in a private action for not sufficiently draining a particular lot of land. But the construction and repair of sewers according to the general plan so adopted are simply ministerial duties, and for any negligence in so constructing a sewer, or keeping it in repair, the municipality which has constructed and owns the sewer may be sued by a person whose property is thereby injured."

As to distinction between legislative and ministerial acts, compare Mills v. Brooklyn, 32 N. Y. 489 (1865), with Barton v. Syracuse, 36 N. Y. 54 (1867).

For some reason the driver of the ice wagon started up his horses, seemingly for the purpose of passing the grocery wagon before the driver of the coal wagon should reach it. The street was narrow, and the ice man's wagon caught in some way against the wheel of the grocery wagon, and turned the wagon somewhat around, so that the thills came down on the sidewalk. At that time Cohen was passing, and the iron on one of the thills struck him on the head and knocked him down, inflicting an injury upon him, from the effect of which he died the same day. The string with which the thills were fastened was a thin, common string; and they had been tied up that way for several months, but whether with the identical string used on the occasion when the accident occurred the witness could not say. The wagon was used by its owner, the grocer, as the evidence tended to show, for the purpose of facilitating the transaction of his private business; and it was in no sense a public cart. When not in actual use, the wagon was kept in the street in front of the owner's grocery store, day and night, under a permit which was granted by defendant in consideration of the payment by the owner of two dollars therefor. No law or ordinance existed which gave jurisdiction to the defendant through its common council, or through any of its officers, to license or permit such a use of the highway.

Upon this evidence as to the manner in which the accident occurred the court directed the jury to find a verdict for the defendant, and the plaintiff duly excepted to such direction. The direction was given by the court below on the ground that the cause of the injury was the defective manner in which the thills were tied, and there was no evidence of any notice to the city as to that fact. The General Term affirmed the judgment of the circuit court, and plaintiffs appeal.

PECKHAM, J. (after stating the facts as above). The storing of the wagon on the highway was a nuisance. The primary use of a highway is for the purpose of permitting the passing and repassing of the public; and it is entitled to the unobstructed and uninterrupted use of the entire width of the highway for that purpose, under temporary exceptions as to deposits for building purposes, and to load and unload wagons, and receive and take away property for or in the interest of the owners of the adjoining premises, which it is not now necessary to more specifically enumerate. The extent of the right of such exceptional user was before us in the late case of Callanan v. Gilman, 107 N. Y. 360, 14 N. E. 264, 1 Am. St. Rep. 831, and nothing more need be said regarding it here.

It is no answer to the charge of nuisance that, even with the obstruction in the highway, there is still room for two or more wagons to pass, nor that the obstruction itself is not a fixture. If it be permanently or even habitually in the highway, it is a nuisance. The highway may be a convenient place for the owner of carriages to keep them in, but the law, looking to the convenience of the greater number, prohibits any such use of the public streets. The old cases said

the king's highway is not to be used as a stable yard; and a party cannot eke out the inconvenience of his own premises by taking in the public highway. These general statements are familiar, and are borne out by the cases cited. King v. Russell, 6 East, 427, decided in May, 1805; Rex v. Cross, 3 Camp. 224; Rex v. Jones, Id. 230; People v. Cunningham, 1 Denio, 524, 43 Am. Dec. 709; Davis v. Mayor, etc., 14 N. Y. 506, 524, 67 Am. Dec. 186; Callanan v. Gilman, supra.

Familiar as the law is on this subject, it is too frequently disregarded or lost sight of. Permits are granted by common councils of cities, or by other bodies in which the power to grant them for some purposes is reposed; and they are granted for purposes in regard to which the body or board assuming to represent the city has no power whatever, and the permit confers no right upon the party who obtains it. As was said by Lord Ellenborough in the case of Rex v. Jones, supra, the law upon the subject is much neglected, and great advantages would arise from a strict, steady application of it. This case is a good example of its neglect. There is no well-founded claim of the existence of a power in the defendant to issue such a license. The defendant refers to sections 10 and 27 of chapter 37 of the ordinances of 1859. The former provides for an assignment by the mayor of a stand where the owner of a duly-licensed public cart may let it remain waiting to be employed, and also a stand where it may remain at other times upon certain terms, etc. The latter section refers to a licensed cartman, and provides for storing his cart in front of his premises under certain regulations. Neither section has anything to do with a case like this. The Legislature has expressly enacted that the city shall have no power to authorize the placing or continuing of any encroachments or obstructions upon any street or sidewalk, except the temporary occupation thereof during the erection or repair of a building on a lot opposite the highway. Consolidation Act, p. 23, § 86, subd. 4; People v. Mayor, etc., 59 How. Prac. 277; Ely v. Campbell, 59 How. Prac. 333; Lavery v. Hannigan, 20 Jones & S. 463.

The owner of this wagon was not a cartman, nor was the wagon used as a public cart, but only as a means to enable the grocer to transact his own private business. He acquired no right by virtue of the license to store his wagon in the street; and, in doing so, he was clearly guilty of maintaining a public nuisance. The defendant was also guilty. It assumed to authorize the erection and continuance of a public nuisance. To be sure, the legal power to grant the license to obstruct the street was by the Legislature withheld from the defendant, yet, nevertheless, it did grant just such a permit and took compensation on account of it. In thus doing, the city became a partner in the erection and continuance of such nuisance. It was a nuisance, not by reason of the manner in which the thills were tied up, but because the wagon was stored in the street. It was not

a mere negative attitude which the defendant adopted, such as would have been the case had it simply acquiesced in the manner in which the street was used. In this case it not only acquiesced in such use, but it actually encouraged it by making out and delivering a license to do it; and it received directly and immediately from the owner of the wagon a compensation for the erection and maintenance of a nuisance under the authority of such license. Under such circumtances the defendant must be held liable the same as if it had itself maintained the nuisance; for the owner of the wagon was nothing more than an agent through whom the defendant did this unlawful act. Irvine v. Wood, 51 N. Y. 224, 10 Am. Rep. 603.

But, assuming that the city had no right to issue the permit, it is urged that such license did not authorize the negligence which caused Cohen's death, and that the act of the defendant was too remote to be regarded as the proximate cause of the damage herein. We do not think so. The act of the defendant was wrongful, and it consisted in setting up an obstruction in the public highway, and this accident happened because of the presence of the obstruction at the point in question. It was there by the act of the defendant, and, being there, it has caused the injury. To be sure, it may be said that, if the thills had not been negligently tied, they would not have fallen. But that was simply the way in which, by reason of the presence of the obstruction, the accident occurred. There is always reasonable ground for apprehending accidents from obstructions in a public highway, and any person who wrongfully places them there, or aids in so doing, must be held responsible for such accidents as occur by reason of their presence. The obstruction in such case must be regarded, within the meaning of the law on the subject, as the proximate cause of the damage.

We think that in a case like this, where no obstruction would have existed but for the wrongful conduct of defendant, it must be held responsible for the damage which is caused by reason of the obstruction, even though it might not have happened if the licensee had been careful in regard to the manner in which he exercised the assumed right granted him by the license. The defendant, under these circumstances, must take the risk of such care, and not an innocent passer-by. This is not a case for the application of the doctrine that where the injury results from the negligent mode in which the licensee exercises the privilege granted to him, which mode is not part of the license, there must be proof of negligence showing permission to use, or acquiesence in the use of, the mode after notice or knowledge on the part of the licensor. That may be the rule where the thing licensed is legal because of the license, and the illegality consists in the manner in which the license is carried out. The difficulty here does not alone consist in the negligent manner of fastening up the thills, but the license itself—the permission, with

or without a consideration, to obstruct the street at all for any such purpose as was the case here—is the wrongful act on the part of the defendant which renders it responsible for the damage naturally sustained from such obstruction.

We do not say that this principle of responsibility would render the city liable in every case of a mistaken exercise of power authorizing the use or occupancy of a public street by an individual. We confine ourselves to the decision of this case, and we simply say that when the city, without the pretense of authority, and in direct violation of a statute, assumes to grant to a private individual the right to obstruct the public highway while in the transaction of his private business, and for such privilege takes compensation, it must be regarded as itself maintaining a nuisance so long as the obstruction is continued by reason of and under such license, and it must be liable for all damages which may naturally result to a third party who is injured in his person or his property by reason or in consequence of the placing of such obstruction in the highway. This is none too severe a liability. It is to be hoped that its enforcement will tend to the discontinuance of a custom of granting permits or licenses to do what it is well known the city has no right to authorize or license. Such licenses, it is matter of public notoriety, are constantly granted without any semblance of legal authority; and the licensees are continually acting under them, and obstructing the public streets, to the serious inconvenience and danger of the public. When it is understood that such license has not only no effect in the way of legalizing an obstruction, but that it simply makes the city a partner in the maintenance of a public nuisance, and liable for the damage caused thereby, such knowledge may perhaps restrain the utterly illegal practice, and tend in some degree to the protection of the public in the lawful use of its own highways.

The judgment must be reversed, and a new trial granted, with costs to abide the event. All concur, except GRAY, J., dissenting on the ground that, assuming the city could not legally grant a license to Marks to keep his wagon in the street, that fact, in this case, was not sufficient to charge the city with liability for the occurrence complained of. The proximate or immediate cause of the injury to the plaintiff's intestate was the negligent acts of others.[54]

[54] See, Landau v. New York, 180 N. Y. 48, 72 N. E. 631, 105 Am. St. Rep. 709 (1904); Van Cleef v. Chicago, 240 Ill. 318, 88 N. E. 815, 23 L. R. A. (N. S.) 636, 130 Am. St. Rep. 275 (1909); Little v. Madison, 42 Wis. 643, 24 Am. Rep. 435 (1877).

CRAIG v. CITY OF CHARLESTON.

(Supreme Court of Illinois. 1899. 180 Ill. 154, 54 N. E. 184.)

Appeal from Appellate Court, Third District.

Action by Edward C. Craig against the City of Charleston. A judgment for defendant on demurrer was affirmed by the Appellate Court (78 Ill. App. 312), and plaintiff appeals. Affirmed.

PER CURIAM. In affirming the judgment of the circuit court for costs and sustaining the demurrer to the plaintiff's declaration, the following opinion, delivered by Mr. Justice HARKER, was rendered by the Appellate Court:

"The sufficiency of the declaration is the only question for our consideration. Stripped of their surplusage, the material averments of fact are that the city of Charleston, on an occasion when a large crowd of people had congregated in the city, appointed one John Apgar as an officer to prevent the obstruction of the streets by vehicles or otherwise, and placed him in control of one of the streets; that Apgar was a dangerous and violent man, and possessed an ungovernable temper and vicious disposition, which facts were known, or by the exercise of reasonable diligence could have been known, to the appointing officer; that Apgar, while in charge of the street and under pretense of discharging his duty, made a brutal and unjustifiable assault upon the plaintiff with a stick, whereby the plaintiff lost one of his eyes, and was otherwise injured. The duties devolving upon Apgar by virtue of his appointment were police duties. He was what is sometimes aptly termed a 'special policeman,' authorized to perform certain specific acts. It is a familiar rule of law, supported by a long line of well-considered cases, that a city, in the performance of its police regulations, cannot commit a wrong through its officers in such a way as to render it liable for tort.

"It is contended, however, that appellant does not base his right of recovery against the city upon the wrongful act of Apgar, merely, but upon the wrongful act of the mayor in appointing such a man as Apgar, when he knew, or should have known, of his dangerous and vicious character. The same principle which absolves the city from liability for Apgar's tortious act applies to the act of the mayor. The mayor was simply exercising a discretion vested in him by virtue of his office and the laws of the state. If the appointment was a wrongful act, which resulted in injury to the appellant, the burdens of liability cannot be cast upon the inhabitants and taxpayers of the city. A municipal corporation, while simply exercising its police powers, is not liable for the acts of its officers in the violation of the laws of the state and in excess of the legal powers of the city. Dill. Mun. Corp. §§ 950, 968; Town of Odell v. Schroeder, 58 Ill. 353; City of Chicago v. Turner, 80 Ill. 419; Wil-

cox v. City of Chicago, 107 Ill. 334, 47 Am. Rep. 434; Blake v. City of Pontiac, 49 Ill. App. 543.

"Appellant further contends that the placing of Apgar in the street and in control of it was the creation of a nuisance, upon which ground it is liable—in fact, his chief contention is that he became thereby an obstruction in the street—and cites a long list of authorities in support of the proposition that it is the duty of a city to keep its streets free from obstructions, and a failure in that regard will render it liable for injuries caused thereby. We cannot regard a human being, in the exercise of police powers, as an obstruction, in the sense contemplated by the unquestioned doctrine announced by those cases. We think the court properly sustained the demurrer to the declaration."

After a careful consideration of the case, we have reached the same conclusion as that arrived at by the courts below; and, concurring in the views of the Appellate Court, we see no necessity for another opinion on this appeal, but adopt the one above set out as the opinion of this court in the case. The judgment of the Appellate Court is affirmed.

Judgment affirmed.[55]

CITY OF SAN ANTONIO v. WHITE.

(Court of Civil Appeals of Texas. 1900. 57 S. W. 858.)

Action by George M. White against the City of San Antonio. From a judgment for plaintiff, defendant appeals. Reversed.

JAMES, C. J. Plaintiff, George M. White, was engaged in running the Maverick Hotel, in San Antonio, about September, 1897. Texas had quarantined against New Orleans on account of yellow fever. A theatrical troupe left New Orleans on the last train before this quarantine was declared and came direct to San Antonio. Several (five or six) of the members of this troupe registered at the Maverick Hotel on the morning of September 7th for breakfast, the others taking quarters elsewhere in the city. In the early afternoon the troupe collected at the opera house for a rehearsal, and late in the afternoon they, 17 or more in all, were, under direction of the mayor and city physician, taken charge of by police, and taken in a body to the Maverick Hotel, where, without the consent and over the protest of plaintiff and his wife, they were quartered as yellow fever suspects, on the third floor of the hotel, and there detained by police officers for six days, the officers using the stairways. The effect of this action upon plaintiff's hotel business was to convert

[55] **Accord:** Buttrick v. Lowell, 1 Allen (Mass.) 172, 79 Am. Dec. 721 (1861); McIlhenney v. Wilmington, 127 N. C. 146, 37 S. E. 187, 50 L. R. A. 470 (1900); Levin v. Burlington, 129 N. C. 184, 39 S. E. 822, 55 L. R. A. 396 (1901).

it from a profitable business to a losing one, until June following, when he went out of the business by making a deed of trust.

The answer of defendant alleged that the city, under its charter, had power to make regulations to secure the general health of the city, to make regulations to prevent the introduction of contagious diseases into the city, to make quarantine laws for that purpose, and to enforce the same, and to make all ordinances and regulations to prevent the spread of any contagious diseases within the city limits, and to establish hospitals and pest houses; also that the city council had ordained that, for the purpose of preventing the introduction of any contagious disease within the city limits, the mayor should be authorized by proclamation, and it was made his duty, whenever the board of health should deem it necessary, to establish quarantine against all persons coming to the city who were liable to cause the introduction or spread of such contagious disease, as well as the isolation and quarantine of all persons within the city, such quarantine to be carried into effect in accordance with the rules and regulations established by the board of health; and further ordained that the mayor and board of health should have power to employ guards and assistants when necessary, and to establish quarantine stations, pest houses, and hospitals for all persons detained under quarantine regulations. It was alleged by defendant that the mayor and board of health, by virtue of said ordinance, for the purpose of preventing the introduction into the city of yellow fever, did, with plaintiff's consent, temporarily isolate and quarantine the said persons at plaintiff's hotel, to the end that such suspected persons should not mingle with the people at large and endanger the public health, and that all the acts of its mayor and board of health were done and performed in good faith, and for the public good, and such acts were due in respect to governmental functions for which defendant is not liable. The mayor and health officer were dismissed from the suit, and the city remained the sole defendant.

The second assignment is that the court should have sustained defendant's special exception to the petition, upon the ground that the city was not liable for the acts of its co-defendants, the mayor and health officer, said acts not being acts of the city; there being no allegation that such acts were authorized by the city council. The allegation was that the city, by and through its mayor and health officer, committed the acts complained of. It is probable that this was sufficient allegation that the city caused the acts to be done. We deem it more advisable to pass upon the liability of the city in the light of the evidence.

The acts detailed above, which are as the jury must have found the facts to be, constituted an unwarrantable trespass, for which the mayor and health officer were probably liable. A fact that is essential to the city's liability in cases of this kind is wanting, viz. the fact that the city was, or has made itself, a party to the trespass.

There is absolutely no evidence from which it can be found that the city directed, or has ratified, the proceeding. A city is not liable for acts of its health officers, or for malfeasances or misfeasances, in the line of their public duties. Shear. & R. Neg. § 266; Bates v. City of Houston, 14 Tex. Civ. App. 287, 37 S. W. 383, where the subject is discussed with ample citation of authorities; Gilboy v. City of Detroit, 115 Mich. 121, 73 N. W. 128. The last case goes so far as to hold that the city would, in no event, be liable for such acts. We are of opinion that at least, without some testimony connecting the corporation with the transaction complained of, either by showing its previous direction, or participation therein, or ratification, there is no basis for any claim of liability against it. In the cases of City of San Antonio v. Mackey, 14 Tex. Civ. App. 210, 36 S. W. 760, and City of Dallas v. Allen (Tex. Civ. App.) 40 S. W. 324, decided by this court, the liability of the city existed by reason of the direction or participation of the cities themselves.

The ground of liability upon which appellant chiefly relies is that the act complained of amounted to an appropriation of property for public uses, and that the city is bound to compensate plaintiff by force of the constitutional guaranty. We are of opinion that a city could not, under the guise of exercising a strictly governmental power, evade this constitutional provision. But it is clear that the act must be the act of the city in such a case. A city cannot be held liable for property taken or appropriated by a trespass with which it has no connection at all. The act complained of here was done by the mayor and health officer, and the city is not shown to have directed it, nor adopted it as its own. Dooley v. City of Kansas, 82 Mo. 444, 52 Am. Rep. 380. We conclude that the fifth assignment was well taken, viz. error in refusing to charge the jury that the city was not liable for any wrong or trespass committed by its mayor, city physician, or police officers, and therefore to return a verdict for defendant.

Reversed and remanded.

NEW YORK CITY CHARTER (LAWS 1901, c. 466) § 1196.

No member, officer or agents of said department of health, and no person or persons other than the department of health or the city itself shall be sued or held to liability for any act done or omitted by either person aforesaid, in good faith, and with ordinary discretion, on behalf or under said department, or pursuant to its regulations, ordinances or health laws. And any person whose property may have been unjustly or illegally destroyed or injured, pursuant to any order, regulation or ordinance, or action of said department of health or its officers, for which no personal liability may exist as aforesaid, may obtain a proper action against the city for the recovery of the proper

compensation or damage. Every such suit must be brought within six months after the case of action arose, and the recovery shall be limited to the damages suffered.

SECTION 40.—SAME—ON IMPLIED CONTRACT

LINCOLN v. CITY OF WORCESTER.

(Supreme Judicial Court of Massachusetts, 1851. 8 Cush. 55.)

SHAW, C. J.[56] This is an action for money had and received, to recover back money paid by the plaintiff to the tax collector, on the ground that the city, by their collector and treasurer, have received a sum of money which they have no just right to retain. The ground upon which this claim is made is that the assessors were chargeable with various mistakes and irregularities, amounting to violations of law, in making their assessment on his property, by misdescription, by classing together lots and parcels of land which ought to have been taxed separately, and by separating into different parcels estates which should have been combined into one parcel and taxed together; also that, in regard to certain personal property, the plaintiff has been taxed for shares for which he was not legally taxable.

The first and great question to be considered, before we can begin to inquire into these irregularities, is whether assumpsit for money had and received will lie against the city, provided such irregularities are shown, and if the assessors acted contrary to the directions of law, in the details of their proceedings in the assessment of taxes. There is another mode of proceeding provided by law (by application for abatement and by appeal), well adapted to correct all errors and mistakes, to relieve the party taxed in regard to all those particulars in which the irregular proceeding can act injuriously upon him, and to confirm and hold good that which upon revision appears regular and conformable to law. When assumpsit lies to recover back money paid, it proceeds on the ground that the tax is void, that the plaintiff has paid it upon compulsion, and that the city, into whose treasury it has passed, in equity and good conscience cannot retain it. It follows that if the whole proceeding is void, and the plaintiff can recover his money back on that ground, it being too late to assess the taxes of a past year again, the plaintiff will avoid paying those sums, which it is conceded were well assessed, and which he is bound equitably, as well as legally, to pay.

The question then may be asked, why has the action for money had and received been sustained in any case? To this question it may

[56] Only a portion of the opinion of Shaw, C. J., is printed.

be proper to offer an answer, and attempt to point out the distinction upon which the cases rest.

We are inclined to think that the maintenance of an action to recover back money paid for a tax (except perhaps in case of a parish tax, in favor of a person of another denomination, under the provisions of the Constitution of Massachusetts—Murray v. First Parish in Gloucester, 2 Dane, Abr. 330, and other cases there cited), is of comparatively recent origin.

The common course was, it is believed, to bring trespass against the assessors, in all cases where the plaintiff intended to hold that he was not liable at all, and that the tax was wholly void. It was not brought against the collector, because he was justified by his warrant from a tribunal of competent jurisdiction; but against the assessors. It proceeded on the ground that as in trespass all are principals, including those who command an illegal act to be done, and as the assessors had issued a warrant to a subordinate executive officer commanding him to levy a tax upon the plaintiff, in a case where they had no authority, and to take his property or person in case of nonpayment, the service of such a warrant was an illegal act, done by their command, and was in theory of law a trespass, for which an action would lie.

In the case of Stetson v. Kempton, 13 Mass. 272, 17 Am. Dec. 145, decided in 1816, it was held that trespass against the assessors would lie, although the sum assessed on the plaintiff was laid and assessed by a vote of the town, to raise money for the defense of the town against a public enemy, such being a purpose for which the town, as a corporation, had no authority to raise money by taxation. The objection was there taken, and the force of it was to a certain extent admitted; but it was held not to be a good defense, because, as the court said, "if the assessors are not liable to an action for causing an arrest, or the seizure of property, for the nonpayment of an illegal tax, it is difficult to find any remedy for an injured citizen in cases of this nature." They add, hypothetically, that "if an action would lie against the town, it could only be for the money actually received into the treasury." That was a case, it will be observed, in which the plaintiff's property had been actually taken on a warrant of distress.

Here, perhaps, is the first intimation that an action may be maintained against the town, and of the principle on which it can be maintained. It is that money has been actually brought into their treasury by their unauthorized, and of course illegal, act, which in equity and good conscience they cannot retain; and this, not for the damages caused by the seizure and sacrifice of property distrained, and not for the expenses incurred, but simply for the money, which they have actually received without right. Such a remedy, if it exist at all, can upon principle apply only to a case where a town or city levy money for their own use without authority, and not where they or their officers assess and collect money for the state, county, or school district.

In 1824, an act was passed (St. 1823, c. 138, § 5) having an impor-

tant bearing on this subject. It provides that the assessors of cities, towns, districts, parishes, or religious societies shall not be made responsible for the assessment of any tax, when thereto required by the constituted authorities thereof; but the liability, if any, shall rest solely with said city, etc., and the assessors shall be responsible only for their own integrity and fidelity. This provision was extended to assessments on school districts by St. 1833, c. 166, and was re-enacted in Rev. St. c. 7, § 44.

The first case, we believe, in which an action for money had and received, to recover back a tax illegally assessed, was maintained, was that of Sumner v. First Parish in Dorchester, 4 Pick. 361. That was an action to recover back a parish tax, brought by one who was not a member, and not liable to taxation, so that the tax was wholly unauthorized as against him, and void. The court refer to the statute of 1823, taking away the remedy against assessors, so that, if this action would not lie, the party illegally taxed would be without remedy. The court further added: "Upon common principles, the corporation having received the money of the plaintiff, to which they have no right, and placed it in their treasury, must be liable to refund it in this action."

This was probably the basis upon which many actions have been since brought to recover back money, where the authority on which it is levied is wholly void.

But it is held that this rule cannot apply to voluntary payments, but only in cases where a party has been compelled to pay, by that species of compulsion which the law considers duress. The principle is fully stated and explained in former cases, and is this: That a warrant of distress is in the nature of an execution against a person, where there has been no judgment, and no opportunity to plead or answer, and therefore, if he refuses to pay, and payment is insisted upon, and that on pain of immediate arrest or seizure of goods, the payment cannot be deemed voluntary; and if he is not liable to taxation, such a menace is duress.[57] If, therefore, he pays, with or without protest, to avoid such duress, he may recover the money back, if he is not liable. Preston v. Boston, 12 Pick. 7; Boston & Sandwich Glass Co. v. Boston, 4 Metc. 181. But these cases go on the assumption that the tax was wholly unauthorized and the assessment, therefore, not irregular only, but void.

One case has been cited, which is supposed to have a contrary bearing, and to hold that part of the tax assessed on a party, for which he is not liable, may be recovered back of the town. Torrey v. Millbury, 21 Pick. 64. Perhaps in this case the point was not so much considered as it would have been but for the express admission, by the counsel for the defendants, that the plaintiff was entitled to recover back his proportion of $100, which the town had no authority to levy, and

[57] See Rev. Laws Mass. c. 13, § 86, giving to a protest the same effect as to duress.

for which, therefore, he was not liable to be assessed; and it was this proportion for which in fact he had judgment. Perhaps, were such a case again under consideration, it might require a careful revision; but the case was decided upon the ground that the vote for raising the $100 was unauthorized, and without warrant of law, and that the tax therefore was wholly void. We are not aware that any decided case has given sanction to the principle that assumpsit against the town or city will lie to recover back money on the ground of any irregularity, error or mistake, in fact or in law, in the mode of making the assessment. On the contrary, we think it is now definitely settled, by a series of decisions, that in such case the party's only remedy is by application to the assessors for abatement. Rev. St. c. 7, § 37. If the party obtain no satisfactory relief there, he may complain to the county commissioners for a revision. Section 39. And it has recently been decided that if there be any error or mistake, in matter of law, in the proceedings of the commissioners, a writ of certiorari from this court will lie to correct them. Newburyport v. County Commissioners, 12 Metc. 211.

Here is an easy, direct, simple and practical remedy given by law, adequate and properly adapted to the case, to be pursued promptly, under proper limitations as to time and course of proceeding, before tribunals specially constituted, and furnished with all the means of affording prompt and efficient relief against all errors, of fact or law, by which a party can be injured by wrong taxation. * * *[58]

[58] See Swift v. Poughkeepsie, 37 N. Y. 511 (1868); Newman v. Supervisors of Livingston Co., 45 N. Y. 676 (1871); Board of Supervisors of Stephenson Co. v. Manny, 56 Ill. 160 (1870); Spring v. Hyde Park, 137 Mass. 554, 50 Am. Rep. 334 (1884).

See Falls v. City of Cairo, 58 Ill. 403, 406 (1871): "The precept, which was in the hands of the officer at the time these assessments were paid, did not authorize him to levy upon the goods and chattels of the appellant, but directed him merely to make sale of the lots to satisfy the assessments. In Bradford v. City of Chicago, 25 Ill. 411, it was held that the payment of an assessment, made to a collector of taxes while having in his hands a warrant to levy and collect the amount of the assessment of the goods and chattels of the owner, might be considered compulsory, and made under such circumstances as would authorize the party paying the money to recover back the same, if the assessment was illegally made. But it was decided in Stover v. Mitchell, 45 Ill. 213, that a levy of an execution upon one's land did not make a case of such duress or compulsion that a payment made to prevent the sale of the land under the execution could be recovered back as a compulsory payment. It was held to be a voluntary payment, and not one made under duress; and it is there said: 'It is insisted that the levy of the execution on Stover's land was the exercise of such compulsion as to interfere with Stover's freedom of action. No case is cited going to this extent, and we venture to say none can be found. In order to render such a payment compulsory, such a pressure must be brought to bear upon the person paying as to interfere in some way with the free enjoyment of his rights of person or property'—citing Bradford v. City of Chicago, supra, and Elston v. City of Chicago, 40 Ill. 514, 89 Am. Dec. 361. There was here no interference with the plaintiff's free enjoyment of his property, and there would not have been, by making sale of it under the precept. Such sale would not have disturbed his possession of the property. He would then have had two years to redeem from the sale,

SECTION 41.—ACTION AGAINST STATE OR GOVERNMENT

ACT ILL. MARCH 23, 1819.

(Laws Ill. 1819, p. 184.)

An act directing the mode of bringing suits, by and against the state, counties, townships, and other corporate bodies and for other purposes.

Section 1. It shall and may be lawful for the Auditor of Public Accounts for the state of Illinois to sue for any demand which the people of the state may have a right to claim; and to be sued for any demand against the people of the state; and to sue and be sued, to plead and be impleaded, to answer and be answered, to defend and be defended, in any court of record, or other place where justice shall be judicially administered, in the name of the Auditor of Public Accounts, for the people of the state of Illinois. * * *

Sec. 5. When judgment shall be rendered against the Auditor of Public Accounts for the state of Illinois, [that] it shall be his duty, by his warrant, to draw upon the State Treasurer for the amount of such judgment, and costs, to the time of the rendition thereof, and for no more. And it shall be the duty of the Treasurer to pay the same out

and if, at the end of that time, the purchaser had obtained his tax deed, and brought his action of ejectment for the recovery of the possession, the illegality of the assessments could have been shown in defense, and the recovery of possession defeated; or, had the plaintiff desired to remove any cloud which might be brought upon his title by such a sale, he could have had his remedy for that purpose. It is very unlike the case of the payment of money, made to avoid the seizure of goods or to gain the possession of them, where there may be a pressing necessity for their immediate use, and, being of a movable and perishable character, any legal remedy might be inadequate for full protection. The reasons upon which it is held that when a party is compelled, by duresss of his person or goods, to pay money for which he is not liable, the payment is not voluntary, but compulsory, and that he may rescue himself from such duress by payment of the money, and afterwards, on proof of the fact, recover it back, do not apply in the case of real estate threatened with such action, as in the present case. And we think the payment of these assessments was not made under such circumstances of constraint and compulsion as to except it from the operation of the legal principle that if a party, with full knowledge of all the facts of the case, voluntarily pays money in satisfaction or discharge of a demand unjustly made on him, he cannot afterwards recover back the money."

Accord: Detroit v. Martin, 34 Mich. 170, 22 Am. Rep. 512 (1876); Lanborn v. County Commissioners, 97 U. S. 181, 186, 24 L. Ed. 926 (1877).

See Ætna Insurance Co. v. Mayor, etc., of New York, 153 N. Y. 331, 340, 47 N. E. 593, 594 (1897): "We are also of the opinion that the payment of the taxes for 1887 and 1888, under the circumstances disclosed by the evidence, was not voluntary, and hence the amount thereof may be recovered in this action. At the time these payments were made, section 314 of chapter 409 of the Laws of 1882 was in force. That section provides that a tax upon the shares of a bank organized under the laws

of any monies in the treasury not otherwise appropriated. * * * Provided, that if the Auditor, commissioners, or trustees, as aforesaid, fail or refuse to give such warrant, as aforesaid, upon request, execution may issue against either of them, for the amount of such judgment, in his or their natural and private capacity, and be collected in the same manner, except that no replevy shall be allowed upon such execution, as though it had been recovered against him or them in his or their natural and private capacity.[59]

ACT ILL. JAN. 3, 1829.

(Rev. Laws Ill. 1832–33, p. 593.)

An act directing the mode of bringing suits, by or against the state.

Section 1. It shall and may be lawful for the Auditor of Public Accounts of the state of Illinois to sue for any demand which the people of the state may have a right to claim, and to be sued and to sue, to plead and to be impleaded, to answer and be answered, to defend and to be defended, in any court of record, or other place, where justice shall be judicially administered, in the name of the Auditor of Pub-

of the state, or of the United States, shall be and remain a lien thereon from the day when the property was assessed, and, if transferred after that day, the transfer shall be subject to such lien. As this tax became and remained a lien upon the plaintiff's bank stock, even after a transfer, it deprived it of an essential element of its ownership and of its right to transfer it. That being the effect of the imposition of the tax, we think it amounted to such an impounding or duress of the plaintiff's property as to render the payment so far involuntary as to authorize an action for the recovery of the money thus wrongfully received by the defendant. The plaintiff could only establish its right to a full enjoyment of its property by proof of the facts which entitled it to an exemption under the statute of 1886, in an action or proceeding instituted for that purpose, or by payment of the tax. The defendant having, by its unauthorized act, placed the plaintiff in that position, it cannot relieve itself from a liability to refund the amount it thus wrongfully received by asserting that the payment was a voluntary one, or by claiming that the plaintiff might have pursued some other remedy to relieve its property from the lien thus established. The payment was necessary to relieve the plaintiff's property from the lien to which it was made subject by the wrongful acts of the defendant's officers, unless it instituted a proceeding to establish the invalidity of the tax. The plaintiff, to enforce its rights, elected to pay the tax and thus relieve its property from such lien, and then to institute an action to recover the amount it was obliged to pay, instead of commencing a proceeding to set aside the tax. We think the defendant is not in a position to complain because the plaintiff elected to pursue the former instead of the latter remedy, and that the payment cannot be held to be so far voluntary as to deprive the plaintiff of its right to recover the amount of taxes thus wrongfully levied and received by the defendant."

Accord: Stephan v. Daniels, 27 Ohio St. 527 (1875).

[59] For earlier legislation, see Act Va. 1778 (9 Hening's St. p. 536), and Commonwealth v. Beaumarchais, 3 Call (Va.) 122–180 (1801); also Act Pa. March 30, 1811 (Dunlop's Laws 1700–1849, p. 287, c. 207), and Fitter v. Com., 31 Pa. 406 (1858).

See, also, Blackstone's Commentaries, III, pp. 254–257, as to petition of right.

lic Accounts, for the people of the state of Illinois: Provided, that the Auditor shall not be liable to be sued in any other county than that in which the seat of government is situated. And the Attorney General of this state shall prosecute and defend all suits brought by or against the Auditor of Public Accounts, as is prescribed by law. From all judgments, so rendered, appeals may be taken to the Supreme Court, and it shall be the duty of the Auditor to take such appeal, if in his opinion justice has not been done in the court where such judgment has been rendered; nor shall any judgment against the Auditor, in his representative capacity, bind him personally, or be conclusive upon the state, until the same shall be examined by the General Assembly. In cases of appeals by the Auditor, he shall not be required to give bond, or security, as in other cases.

Sec. 2. When judgment shall be rendered against the Auditor of Public Accounts for the state of Illinois, it shall be the duty to forward a copy of such judgment, and proceedings thereon, to the next General Assembly, and if approved by the same, an appropriation shall be made to satisfy the same, or such part thereof as said general assembly may deem just.

Sec. 3. The act entitled "An act directing the mode of bringing suits, by and against the state, counties, townships, and other corporate bodies, and for other purposes," approved March 23, 1819, is hereby repealed.

This act to be in force from and after the first day of June next.[60]

CONST. ILL. 1848, art. 3, § 34.

The General Assembly shall direct by law in what manner suits may be brought against the state.†

CONST. ILL. 1870, art. 4, § 26.

The state of Illinois shall never be made defendant in any court of law or equity.

ACT ILL. MAY 29, 1877.

(Laws Ill. 1877, p. 64.)

An act to create a Commission of Claims, and to prescribe its powers and duties. In force July 1, 1877.

Section 1. There shall be, and hereby is created and constituted a commission to be called the "Commission of Claims," which shall be composed of one of the judges of the Supreme Court, who shall be

[60] This act was repealed by Rev. St. 1845, p. 464, c. 90.

† No such law appears to have been enacted.

president of said commission, and two judges of the circuit courts of this state. * * *

Sec. 2. It shall be the duty of said commission to hear and determine all unadjusted claims of all persons, against the state of Illinois, and said commission shall hear and determine such claims according to the principles of equity and justice, except as otherwise provided in the laws of this state, and in case said commission shall allow any such claim, they shall make and award in favor of the claimant, finding the amount due to such claimant, and naming the claimant, which said award shall be filed and recorded in the office of the Auditor of Public Accounts, in a book to be kept by him for that purpose. * * *

Sec. 5. The Auditor shall, in his biennial report to the Governor, include a detailed statement of all such awards, and said statement shall be laid before the two houses of the General Assembly at its session held next after the filing of said awards.

ACT ILL. MAY 16, 1903.

(Laws 1903, p. 140.)

An act to create the Court of Claims and to prescribe its powers and duties.

* * * * * * * * * *

Sec. 2. The Court of Claims shall consist of three persons, not more than two of whom shall belong to the same political party, learned in the law and experienced in its practice, appointed by the Governor, by and with the advice and consent of the Senate, who shall hold their office for the term of four years, from the time of their appointment and until their successors or successor of either of them, shall be appointed. * * *

Sec. 3. The Court of Claims shall have power to make such rules, not inconsistent with or contrary to law, for the government of proceedings before it as it may deem proper, and shall have the same power to enforce such rules, and to preserve order and decorum in its presence, as is vested by common law or statute of this state in any court of general jurisdiction. And it shall be the duty of said court to hear and determine the following matters:

First—All unadjusted claims founded upon any law of the state or upon any contract, express or implied, with the government of the state, and all claims which may be referred to it by either house of the General Assembly.

Second—All claims against the state for the taking or damaging of private property by the state for public purposes in the construction, or for the use of any state institution, river, canal, or other public improvement, which have not been already barred by any statute or law of limitations, or heretofore heard and determined by said commission.

Third—All unadjusted and controverted claims against the board of trustees, or board of directors of any of the public educational, charitable, penal or reformatory institutions of the state, canal commissioners, commissioners for the construction of the state capitol building, state board of education, the military power of the state when called into action for the preservation of the public peace or order, or for instruction in camp, arising out of any contract expressed or implied, or in tort, or for any damages, whether liquidated or unliquidated, or any other claim or demand whatsoever.

Fourth—All other unadjusted claims of whatsoever nature or character against the state of Illinois.

Fifth—All set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the state of Illinois, or any board of trustees, directors, or commissioners, or military authority against whom any such claim shall have been presented to such court. And such court shall hear such claims according to its rules and established practice, and determine the same according to the principles of equity and justice, except as otherwise provided in the laws of this state, and shall file with the records of each claim determined, a brief written statement of the reason of the determination, and in case such court shall allow all or any part of such claim, they shall make an award in favor of the claimant, finding the amount due to each claimant, which said award, shall be filed and recorded in the office of the Auditor of Public Accounts in a book to be kept by him for that purpose. * * *

Sec. 8. The Auditor shall, in his biennial report to the Governor, include a detailed statement of all such awards, and said statement shall be laid before the two houses of the General Assembly at its session held next after the filing of such award. * * *

Sec. 11. An act to create a commission of claims and to prescribe its powers and duties, approved May 29, 1877, in force July 1, 1877, as amended by act of June 3, 1889, in force July 1, 1889, is hereby repealed.[61]

UNITED STATES REVISED STATUTES.

Sec. 1059. [Act Feb. 24, 1855.] The Court of Claims shall have jurisdiction to hear and determine the following matters:

First. All claims founded upon any law of Congress, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, and all claims which may be referred to it by either House of Congress. [U. S. Comp. St. 1901, p. 734.]

[61] For New York, see Laws 1870, c. 321; Laws 1876, c. 444; Laws 1883, c. 205; Laws 1897, c. 36. For Massachusetts, see Rev. Laws, c. 201.

Sec. 1089. In all cases of final judgments by the Court of Claims, or, on appeal, by the Supreme Court, where the same are affirmed in favor of the claimant, the sum due thereby shall be paid out of any general appropriation made by law for the payment and satisfaction of private claims, on presentation to the Secretary of the Treasury of a copy of said judgment, certified by the clerk of the Court of Claims, and signed by the chief justice, or, in his absence, by the presiding judge of said court. [U. S. Comp. St. 1901, p. 745.] [62]

LANGFORD v. UNITED STATES.

(Supreme Court of United States, 1879. 101 U. S. 341, 25 L. Ed. 1010.)

Appeal from the Court of Claims.

Mr. Justice MILLER delivered the opinion of the court.

This suit was brought by the plaintiff against the United States to recover for the use and occupation of certain lands and buildings. The judgment of the Court of Claims was rendered against him, and he appealed here.

The first question arising in this case concerns the jurisdiction of the Court of Claims, upon the suggestion of the Attorney General that the claim is not founded on contract, either express or implied. That court could have no cognizance of the case on any other ground, according to the express language of the statute defining its jurisdiction. Rev. St. § 1059 (U. S. Comp. St. 1901, p. 734).

The findings of the court leave no doubt that the Indian agents acting for the United States, and without the consent of the American Board of Commissioners for Foreign Missions, took possession of the buildings which that board had erected upon the lands, and have since retained them by force and against its will or that of Langford, who claims title under it. The United States always asserted that their possession was by virtue of their own title, which was hostile to that of the claimant. The military of the United States was at one time ordered to protect by force the occupation of the agents.

Conceding that the title, or even the right to the possession of the premises, was in claimant, it would seem that the facts above stated

[62] Act March 2, 1887, c. 359, 24 Stat. 505 (U. S. Comp. St. 1901, p. 752), known as the Tucker act: The provisions of this act are set forth in U. S. v. Jones, 131 U. S. 1, 9 Sup. Ct. 669, 33 L. Ed. 90 (1889), post, p. 382.

See, also, Act May 7, 1822, c. 96, § 6, 3 Stat. p. 692: "It shall be lawful for the legal representative of any former proprietor of the land directed to be disposed of by this act, or persons lawfully claiming title under them, and they are hereby permitted and authorized, at any time within one year from the passing of this act, to institute a bill in equity in the nature of a petition of right against the United States, in the Circuit Court of the United States for the District of Columbia, in which they may set forth the grounds of their claim to the land in question." See 13 Am. Jurist, p. 34.

show that the act of the United States in taking and holding that possession was an unequivocal tort, if the government can be capable of committing one, and that if the case were between individuals every implication of a contract would be repelled.

Counsel for claimant, admitting this to be true, makes a very ingenious argument to prove that the government, in taking and using the property of an individual against his consent, and by force, cannot be guilty of a tort, because the nature of the relation of the government to its citizens, and the provisions of the Constitution, create an implied obligation to pay for property, or for the use of property, so taken. The argument rests on two distinct propositions: (1) That the maxim of English constitutional law, that the king can do no wrong, is one which the courts must apply to the government of the United States, and that therefore there can be no tort committed by the government. (2) That by virtue of the constitutional provision that private property shall not be taken for public use, without just compensation, there arises in all cases where such property is so taken an implied obligation to pay for it.

It is not easy to see how the first proposition can have any place in our system of government.

We have no king to whom it can be applied. The President, in the exercise of the executive functions, bears a nearer resemblance to the limited monarch of the English government than any other branch of our government, and is the only individual to whom it could possibly have any relation. It cannot apply to him, because the Constitution admits that he may do wrong, and has provided, by the proceeding of impeachment, for his trial for wrong-doing, and his removal from office if found guilty. None of the eminent counsel who defended President Johnson on his impeachment trial asserted that by law he was incapable of doing wrong, or that, if done, it could not, as in the case of the king, be imputed to him, but must be laid to the charge of the ministers who advised him.

It is to be observed that the English maxim does not declare that the government, or those who administer it, can do no wrong; for it is a part of the principle itself that wrong may be done by the governing power, for which the ministry, for the time being, is held responsible; and the ministers personally, like our President, may be impeached, or, if the wrong amounts to a crime, they may be indicted and tried at law for the offense.

We do not understand that either in reference to the government of the United States, or of the several states, or of any of their officers, the English maxim has an existence in this country.

The other point is one which requires more delicate handling.

We are not prepared to deny that when the government of the United States, by such formal proceedings as are necessary to bind it, takes for public use, as for an arsenal, custom house, or fort,

land to which it asserts no claim of title, but admits the ownership to be private or individual, there arises an implied obligation to pay the owner its just value.

It is to be regretted that Congress has made no provision by any general law for ascertaining and paying this just compensation. And we are not called on to decide that when the government, acting by the forms which are sufficient to bind it, recognizes the fact that it is taking private property for public use, the compensation may not be recovered in the Court of Claims. On this point we decide nothing.

What is pertinent to the present case is that, conceding that principle, it does not confer on that court the authority to decide that the United States, in asserting the right to use its own property, is using that of an individual, and in taking possession of such property under claim of title, and retaining it by force against an opposing claimant, has come under an implied contract to pay him for the use of the property. In the first case, the government admits the title of the individual and his right to compensation. This right to compensation follows from the two propositions, that it was private property and was taken for public use, neither of which is disputed.

It is a very different matter where the government claims that it is dealing with its own, and recognizes no title superior to its own. In such case the government, or the officers who seize such property, are guilty of a tort, if it be in fact private property. No implied contract to pay can arise any more than in the case of such a transaction between individuals. It is conceded that no contract for use and occupation would, in that case, be implied.

Congress, in establishing a court in which the United States may primarily be sued as defendants, proceeded slowly and with great caution. As at first organized, the Court of Claims was merely an auditing board, authorized to pass upon claims submitted to it, and report to the Secretary of the Treasury. He submitted to Congress such confirmed claims as he approved, with an estimate for their insertion in the proper appropriation bill. Such as he disapproved demanded no further action.

It was by reason of that feature of the law that this court refused to exercise the appellate jurisdiction over awards of that court which the act of Congress attempted to confer, because the court was of opinion that the so-called Court of Claims was not, in the constitutional sense, a court which could render valid judgments, and because there could be no appeal from the Supreme Court to the Secretary of the Treasury. Gordon v. United States, 2 Wall. 561, 17 L. Ed. 921. An act of Congress removing this objectionable feature having passed the year after that decision, the appellate power of this court has been exercised ever since. The jurisdiction of that court has received frequent additions by the reference of cases to it

under special statutes, and by other changes in the general law; but the principle originally adopted, of limiting its general jurisdiction to cases of contract, remains. There can be no reasonable doubt that this limitation to cases of contract, express or implied, was established in reference to the distinction between actions arising out of contracts, as distinguished from those founded on torts, which is inherent in the essential nature of judicial remedies under all systems, and especially under the system of the common law.

The reason for this restriction is very obvious on a moment's reflection. While Congress might be willing to subject the government to the judicial enforcement of valid contracts, which could only be valid as against the United States when made by some officer of the government acting under lawful authority, with power vested in him to make such contracts, or to do acts which implied them, the very essence of a tort is that it is an unlawful act, done in violation of the legal rights of some one. For such acts, however high the position of the officer or agent of the government who did or commanded them, Congress did not intend to subject the government to the results of a suit in that court. This policy is founded in wisdom, and is clearly expressed in the act defining the jurisdiction of the court; and it would ill become us to fritter away the distinction between actions ex delicto and actions ex contractu, which is well understood in our system of jurisprudence, and thereby subject the government to payment of damages for all the wrongs committed by its officers or agents, under a mistaken zeal, or actuated by less worthy motives.

The question is not a new one in this court.

In Nicholl v. United States, 7 Wall. 122, 19 L. Ed. 125, where a suit was brought in the Court of Claims to recover back money exacted of an importer in excess of the duties allowed by law, the court held that no contract to refund was implied, because the money, though paid under protest, was paid voluntarily, and for this reason, among others, that court had no jurisdiction.

In Gibbons v. United States, 8 Wall. 269, 19 L. Ed. 453, an army contractor, who had agreed to furnish two hundred thousand bushels of oats at a fixed price, had, as this court held, after delivering part of the amount, been legally released from the obligation to deliver the balance. He was, however, carried before the military authority in a state of fear and trepidation and to save himself further trouble agreed to and did deliver the remainder of the oats. He sued in the Court of Claims for the difference between the contract price and the market price of the oats at the time of the delivery. One ground of his claim was that he acted under duress and the constraint of fear, and that his agreement to deliver at the contract price was void.

This court said, in answer to this argument, that "it is not to be disguised that this case is an attempt, under the assumption of an implied contract, to make the government responsible for the unau-

thorized acts of its officers, those acts being in themselves torts. * * * The language of the statutes which confer jurisdiction upon the Court of Claims excludes, by the strongest implication, demands against the government founded on torts. The general principle which we have already stated as applicable to all governments, forbids, on a policy imposed by necessity, that they should hold themselves liable for unauthorized wrongs inflicted by their officers on the citizen, though occurring while engaged in the discharge of official duties. * * * These reflections admonish us to be cautious that we do not permit the decision of this court to become authority for righting in the Court of Claims all wrongs done to individuals by the officers of the general government, though they have been committed while serving the government and in the belief that it was for its interest. In such cases, where it is proper for the nation to furnish a remedy, Congress has wisely reserved the matter for its own determination."

With the reaffirmation of this doctrine, which excludes the present case from the jurisdiction of that court, its judgment dismissing the petition of plaintiff is affirmed.[63]

UNITED STATES v. GREAT FALLS MFG. CO.

(Supreme Court of United States, 1884. 112 U. S. 645, 5 Sup. Ct. 306, 28 L. Ed. 846.)

Mr. Justice HARLAN delivered the opinion of the court.[64] * * * From the report and documents transmitted to Congress by President Fillmore it appears that, in the judgment of the engineer department, the best mode of supplying the cities of Washington and Georgetown with wholesome water was by an aqueduct from the

[63] The sovereign is not liable for the tort of his agents, even where consent is given to be sued on any cause of action. Rexford v. State, 105 N. Y. 229, 11 N. E. 514 (1887); Belt v. State of Illinois, 1 Ill. Court of Claims Rep. 266 (1902). But see Ballou v. State, 111 N. Y. 496, 18 N. E. 627 (1888), case of a nuisance caused by property of state.

"A petition of right, unlike a petition addressed to the grace and favor of the sovereign, is founded on the violation of some right in respect of which, but for the immunity from all process with which the law surrounds the person of the sovereign, a suit at law or equity could be maintained. The petition must therefore show on the face of it some ground of complaint which, but for the inability of the subject to sue the sovereign, might be made the subject of a judicial proceeding. Now, apart altogether from the question of procedure, a petition of right in respect of a wrong in the legal sense of the term shows no right to legal redress against the sovereign. For the maxim that the king can do no wrong applies to personal as well as to political wrongs, and not only to wrongs done personally by the sovereign, if such a thing can be supposed to be possible, but to injuries done to a subject by the authority of the sovereign. For from the maxim that the king cannot do wrong it follows as a necessary consequence that the king cannot authorize wrong." Feather v. Reg., 6 B. & S. 257, 295 (1865).

[64] The statement of facts and a portion of the opinion are omitted.

Great Falls of the Potomac; also, that such a plan necessarily involved the construction of a dam at that point in the river. Ex. Doc. (Senate) No. 48, pp. 2, 35, 48, 32d Cong. 2d Sess. By the annual report, under date of December 4, 1863, of Mr. Usher, Secretary of the Interior, Congress was informed that "certain parties having from time to time made claim to heavy damages for the diversion of the water from the Potomac river," his immediate predecessor, "with a view to settle and end this claim, entered into an agreement of arbitration with the claimants." The parties referred to were the present claimants, as appears by the agreement of arbitration, by the official documents submitted to Congress, and by the proceedings in the courts of Maryland for an assessment of the damages which the proposed dam should cause to the Great Falls Manufacturing Company.

The Secretary said: "Pursuant to this agreement, the arbitrators met from time to time, and finally submitted their award, by which they adjudged in favor of the claimants upon each and all of the plans and modes submitted to them, being three [four] in number, for the construction of the dam across the Potomac, and also $12,000 for their own fees as arbitrators, and $761.84 for the expenses of arbitration. The sums being large, I did not feel justified in applying the existing appropriation for the completion of the aqueduct to the payment thereof, preferring to submit the whole matter to Congress for its determination. It appears from the report of the experienced engineer in charge of the work, as must be obvious to every observer, that an ample supply of water for the use of the cities of Washington and Georgetown, for many years to come, can be obtained from the Potomac by the erection of a tight dam, extending from the Maryland shore to Conn's Island, to a height which will give a head of six feet in the aqueduct, and yield a daily supply of 65,000,000 gallons," etc. After expressing the opinion that such a dam could not work injury to the proprietors of the water rights claimed at the Great Falls, the Secretary recommended that a reasonable sum be appropriated to pay the expenses of the arbitration, and that the cost previously estimated of a dam across the main channel be diminished to that of the proposed dam over the east channel.

In conformity with that recommendation, Congress, by the act of July 4, 1864, made the appropriation of $150,000 for the purpose of constructing the proposed dam of solid masonry, and for paying the existing liabilities and the expenses connected with the engineering, superintendence, and repairs of the aqueduct. Immediately thereafter a contract was made for the construction of that dam. In his next annual report, under date of December 5, 1864, the Secretary informed Congress that the work upon the dam and the aqueduct required the expenditure of the additional sum of $51,945. For that amount an appropriation was promptly made. With the Secretary's

report was transmitted to Congress that of the engineer in charge, who stated that "the question of land damages and water rights at the Great Falls still remains unsettled." The dam was completed to its present height in 1867, and is used as an indispensable part of the system by which the cities of Washington and Georgetown have been supplied with water. Beyond doubt the land and the water rights and privileges in question have for nearly 20 years been held and used by officers and agents of the government, without any compensation whatever having been made therefor to the claimant. By what authority have they appropriated to public use the property of the claimant? The answer to this question will determine whether the present demand of the claimant arises out of an implied contract, and therefore enforceable by suit against the United States in the Court of Claims.

It seems clear that these property rights have been held and used by the agents of the United States, under the sanction of legislative enactments by Congress; for the appropriation of money specifically for the construction of the dam from the Maryland shore to Conn's island was, all the circumstances considered, equivalent to an express direction by the legislative and executive branches of the government to its officers to take this particular property for the public objects contemplated by the scheme for supplying the capital of the nation with wholesome water. The making of the improvements necessarily involved the taking of the property; and if, for the want of formal proceedings for its condemnation to public use, the claimant was entitled, at the beginning of the work, to have the agents of the government enjoined from prosecuting it until provision was made for securing, in some way, payment of the compensation required by the Constitution—upon which question we express no opinion—there is no sound reason why the claimant might not waive that right, and, electing to regard the action of the government as a taking under its sovereign right of eminent domain, demand just compensation. Kohl v. U. S., 91 U. S. 374, 23 L. Ed. 449. In that view, we are of opinion that the United States, having by its agents, proceeding under the authority of an act of Congress, taken the property of the claimant for public use, are under an obligation, imposed by the Constitution, to make compensation. The law will imply a promise to make the required compensation, where property, to which the government asserts no title, is taken, pursuant to an act of Congress, as private property to be applied for public uses. Such an implication being consistent with the constitutional duty of the government, as well as with common justice, the claimant's cause of action is one that arises out of implied contract within the meaning of the statute, which confers jurisdiction upon the Court of Claims of actions founded "upon any contract, express or implied, with the government of the United States."

This case is materially different from Langford v. U. S., 101 U. S. 341, 25 L. Ed. 1010. That was an action in the Court of Claims against the United States to recover for the use and occupation of certain lands and buildings to which the claimant asserted title. It there appeared that, throughout the whole period of such occupation and use, the title of the claimant was disputed by the government and that possession was taken and held by its agents in virtue of a title asserted to be in the United States. The jurisdiction of the Court of Claims was attempted to be sustained upon the ground that the government, in taking and using the property of an individual, against his consent and by force, could not, under the relations between it and the citizen, commit a tort, but was under an implied obligation, created by the Constitution, to pay for the property, or for the use of the property, so taken. This proposition was held to be untenable under the facts of that case, for the reason that, while individual officers of the government might be guilty of a tort, if the property so held by them was in fact private property, yet, if the government never recognized the property as private property, taken by its agents for public use, it could not be held liable for its value as upon implied contract. In the same case it was said: "We are not prepared to deny that when the government of the United States, by such formal proceedings as are necessary to bind it, takes for public use, as for an arsenal, custom house, or fort, land to which it asserts no title, but admits the ownership to be private or individual, there arises an implied obligation to pay the owner its just value. It is to be regretted that Congress has made no provision by any general law for ascertaining and paying this just compensation. And we are not called on to decide that when the government, acting by the forms which are sufficient to bind it, recognizes the fact that it is taking private property for public use, the compensation may not be recovered in the court of claims. On this point we decide nothing."

The question thus reserved from decision is substantially the one now presented. In the present case there were, it is true, no statutory proceedings for the condemnation of the claimant's property rights. Such proceedings, as has been stated, were instituted by the United States in one of the courts of Maryland, in which the property rights of the claimant were expressly recognized. But they were abandoned. One reason, perhaps, for such abandonment was that, in the judgment of the officers of the United States, a fair assessment of damages could not be had in the mode prescribed by the Maryland statute. Be this as it may, it is clear, from the record, that the government did not assert title in itself to this property, at the time it was taken. Having abandoned the proceedings of condemnation, the proper officers of the government, in conformity with the acts of Congress, constructed the dam from the Maryland shore to Conn's Island, the doing of which necessarily involved the occupation

and use of the property, as contemplated in what was called the fourth plan for bringing water from the Great Falls to Washington and Georgetown. In such a case, it is difficult to perceive why the legal obligation of the United States to pay for what was thus taken pursuant to an act of Congress, is not quite as strong as it would have been had formal proceedings for condemnation been resorted to for that purpose. If the claimant makes no objection to the particular mode in which the property has been taken, but substantially waives it, by asserting, as is done in the petition in this case, that the government took the property for the public uses designated, we do not perceive that the court is under any duty to make the objection in order to relieve the United States from the obligation to make just compensation. In reference to the title which the government will acquire, as the result of this suit, there would seem to be no difficulty. The finding of the court is that the claimant exhibited to the arbitrators a valid title to the lands in question. It does not appear that the company has ever parted with that title; and the finding is that no title except that of the claimant is asserted.

What has been said is sufficient to dispose of the case, and requires an affirmance of the judgment. It is so ordered.[65]

DOOLEY v. UNITED STATES.

(Supreme Court of United States, 1901. 182 U. S. 222, 21 Sup. Ct. 762, 45 L. Ed. 1074.)

Mr. Justice BROWN delivered the opinion of the court.[66]

1. The jurisdiction of the court in this case is attacked by the government upon the ground that the Circuit Court, as a court of claims, cannot take cognizance of actions for the recovery of duties illegally exacted.

By an act passed March 3, 1887, to provide for the bringing of suits against the government, known as the Tucker act (24 Stat. 505, c. 359 [U. S. Comp. St. 1901, p. 752]), the Court of Claims was vested with jurisdiction over, "first, all claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable"; and by sec-

[65] See, also, United States v. Lynah, 188 U. S. 445, 23 Sup. Ct. 349, 47 L. Ed. 539 (1903).

[66] Only a portion of the opinion of Mr. Justice Brown is printed.

tion 2 the District and Circuit Courts were given concurrent jurisdiction to a certain amount.

The first section evidently contemplates four distinct classes of cases: (1) Those founded upon the Constitution or any law of Congress, with an exception of pension cases; (2) cases founded upon a regulation of an executive department; (3) cases of contract, express or implied, with the government; (4) actions for damages, liquidated or unliquidated, in cases not sounding in tort. The words "not sounding in tort" are in terms referable only to the fourth class of cases.

The exception to the jurisdiction is based upon two grounds: First, that the court has no jurisdiction of cases arising under the revenue laws; and, second, that it has no jurisdiction in actions for tort.

In support of the first proposition we are cited to the case of Nichols v. United States, 7 Wall. 122, 19 L. Ed. 125, in which it was broadly stated that "cases arising under the revenue laws are not within the jurisdiction of the Court of Claims." The action in that case was brought to recover an excess of duties paid upon certain liquors which had leaked out during the voyage, and, being thus lost, were never imported in fact into the United States. Plaintiffs paid the duties, as exacted, but made no protest, and subsequently brought suit in the Court of Claims for the overpayment. The act in force at that time gave the Court of Claims power to hear and determine "all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States." The court held, first, that the duties could not be recovered because they were not paid under protest, and, second, that Congress did not intend to confer upon the Court of Claims jurisdiction of cases arising under the revenue laws, inasmuch as, by the act of February 26, 1845 (5 Stat. 727, c. 22), Congress had given a right of action against the collector in favor of persons "who have paid, or shall hereafter pay, money, as and for duties, under protest * * * in order to obtain goods, wares, or merchandise imported by him or them, or on his or their account, which duties are not authorized or payable in part or in whole by law," provided that protests were duly made in writing. It was held that this remedy was exclusive, and that Congress, after having carefully constructed a revenue system, with ample provisions to redress wrong, did not intend to give to the taxpayer and importer a different and further remedy.

Subsequent statutes, however, have so far modified that special remedy that it can no longer be made available, and the broad statement in the Nichols Case, that revenue cases are not within the cognizance of the Court of Claims, if still true, must be accepted with material qualifications. By the customs administrative act of 1890, as we have just held in De Lima v. Bidwell, 182 U. S. 1, 21 Sup.

Ct. 743, 45 L. Ed. 1041, an appeal is given from the decision of the collector "as to the rate and amount of duties chargeable upon imported merchandise," to a board of general appraisers, whose decision shall be final and conclusive "as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification," unless application be made for a review to the Circuit Court of the United States. This remedy is doubtless exclusive as applied to customs cases; but, as we then held, it has no application to actions against the collector for duties exacted upon goods which were not imported at all. Such cases, although arising under the revenue laws, are not within the purview of the customs administrative act; as for such cases there is still a common-law right of action against the collector, and we think also by application to the Court of Claims. There would seem to be no doubt about plaintiffs' remedy against the collector at San Juan.

In the Nichols Case it was held that, as there was a remedy by action against the collector, expressly provided by statute, that remedy was exclusive. In De Lima v. Bidwell we held that, although no other remedy was given expressly by statute than that provided by the customs administrative act, there was still a common-law remedy against the collector for duties exacted upon goods not imported at all; but it does not therefore follow that this remedy is exclusive, and that the importer may not avail himself of his right of action in the Court of Claims.

But conceding that the Nichols Case does not stand in the way of a suit in the Court of Claims, the government takes the position that a suit in the United States to recover back duties illegally exacted by a collector of customs is really an action "sounding in tort," though not an action "for damages, liquidated or unliquidated," within the fourth class of cases enumerated in the Tucker act.

There are a number of authorities in this court upon that subject which require examination. The question is whether any claim sounding in tort can be prosecuted in the Court of Claims, notwithstanding the words "not sounding in tort," in the Tucker act, are apparently limited to claims for damages, liquidated or unliquidated. The question was first considered in Langford v. United States, 101 U. S. 341, 25 L. Ed. 1010, under the statute above cited, giving the Court of Claims power to hear and determine "all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States." The suit was brought to recover for the use and occupation of certain lands and buildings of which possession had been forcibly taken by agents of the government, against the will of Langford, who claimed title to the lands. It was held that the act of the United States in taking and holding possession was an unequivocal tort, and a distinction was drawn between such

a case and one where the government takes for public use lands to which it asserts no claim of title, but admits the ownership to be private or individual, in which class there arises an implied obligation to pay the owner its just value. "It is a very different matter where the government claims that it is dealing with its own, and recognizes no title superior to its own. In such case the government, or the officers who seize such property, are guilty of a tort, if it be in fact private property." It was held that the limitation of the act to cases of contract, express or implied, "was established in reference to the distinction between actions arising out of contracts, as distinguished from those founded on torts, which is inherent in the essential nature of judicial remedies under all systems, and especially under the system of the common law."

The case was rested largely upon that of Gibbons v. United States, 8 Wall. 269, 19 L. Ed. 453, in which an army contractor who had agreed to furnish certain oats at a fixed price had, after the delivery of part of the amount, been released from the obligation to deliver the balance. He was, however, carried before the military authority, and, influenced by threats, agreed to deliver, and did deliver, the full quantity of oats specified in the contract. He brought suit for the difference between the contract price and the market price of the oats at the time of delivery. It was said that "if such pressure was brought to bear upon him as would make the renewal of the contract void, as being obtained by duress, then there was no contract, and the proceeding was a tort for which the officer may have been personally liable," but that it was not within the Court of Claims act.

The act of March 3, 1887 (the Tucker act), was first considered by this court in United States v. Jones, 131 U. S. 1, 9 Sup. Ct. 669, 33 L. Ed. 90, in which it was held not to confer upon the Court of Claims jurisdiction in equity to compel the issue and entry of a patent for public land, following United States v. Alire, 6 Wall. 573, 18 L. Ed. 947, and Bonner v. United States, 9 Wall. 156, 19 L. Ed. 666. In delivering the opinion, Mr. Justice Bradley compared the original act with the Tucker act, and held that there was no such difference in language as to justify an equitable jurisdiction to compel the issue of a patent.

In Hill v. United States, 149 U. S. 593, 13 Sup. Ct. 1011, 37 L. Ed. 862, it was held that a claim for damages for the use and occupation of land under tide water, for the erection and maintenance of a lighthouse, without the consent of the owner, but not showing that the United States had acknowledged any right of property in him as against them, was a case sounding in tort, of which the Circuit Court had no jurisdiction under the Tucker act. It was said that "the United States cannot be sued in their own courts without their consent, and have never permitted themselves to be sued in any court for torts committed in their name by their officers. Nor can the settled distinction, in this respect, between contract and tort, be evaded

by framing the claim as upon an implied contract." "An action in the nature of assumpsit for the use and occupation of real estate will never lie where there has been no relation of contract between the parties, and where the possession has been acquired and maintained under a different or adverse title, or where it is tortious and makes the defendant a trespasser." No distinction was noticed between the phraseology of the original act and the Tucker act, though it seems to have been assumed that the case was one for the recovery of "damages" sounding in tort.

In Schillinger v. United States, 155 U. S. 163, 15 Sup. Ct. 85, 39 L. Ed. 108, it was held that the Court of Claims had no jurisdiction of an action upon a claim against the government for the wrongful appropriation of a patent by the United States, against the protest of the patentee. It was said to be an action for damages sounding in tort, and therefore not maintainable. "Not only does the petition count upon a tort, but also the findings show a tort. That is the essential fact underlying the transaction, and upon which rests every pretense of a right to recover. There was no suggestion of a waiver of the tort or a pretense of any implied contract until after the decision of the Court of Claims that it had no jurisdiction over an action to recover for the tort."

In the cases under consideration the argument is made that the money was tortiously exacted; that the alternative of payment to the collector was a seizure and sale of the merchandise for the nonpayment of duties; and that it mattered not that at common law an action for money had and received would have lain against the collector to recover them back. But whether the exactions of these duties were tortious or not, whether it was within the power of the importer to waive the tort and bring suit in the Court of Claims for money had and received, as upon an implied contract of the United States to refund the money in case it was illegally exacted, we think the case is one within the first class of cases specified in the Tucker act, of claims founded upon a law of Congress, namely, a revenue law, in respect to which class of cases the jurisdiction of the Court of Claims, under the Tucker act, has been repeatedly sustained.

Thus, in United States v. Kaufman, 96 U. S. 567, 24 L. Ed. 792, a brewer who had been illegally assessed for a special tax upon his business was held entitled to bring suit in the Court of Claims to recover back the amount, upon the ground that no special remedy had been provided for the enforcement of the payment, and consequently the general laws which govern the Court of Claims may be resorted to for relief, if any can be found applicable to such a case. This is upon the principle that a liability created by statute without a remedy may be enforced by a common-law action. The Nicholas Case was distinguished upon the ground that the statute there had provided a special remedy.

So, too, in United States v. Real Estate Sav. Bank, 104 U. S. 728, 26 L. Ed. 908, the Court of Claims was held to have jurisdiction of a suit to recover back certain taxes and penalties assessed upon a savings bank.

In Campbell v. United States, 107 U. S. 407, 2 Sup. Ct. 759, 27 L. Ed. 592, it was held that a party claiming to be entitled to a drawback of duties upon manufactured articles exported might, when payment thereof has been refused, maintain a suit in the Court of Claims, because the facts found raised an implied contract that the United States would refund to the importer the amount he had paid to the government. There was here no question of tort.

In United States v. Great Falls Mfg. Co., 112 U. S. 645, 5 Sup. Ct. 306, 28 L. Ed. 846, it was held, following the observation of Mr. Justice Miller in Langford v. United States, that where property to which the United States asserts no title was taken by their officers or agents, pursuant to an act of Congress, as private property for public use, there was an implied obligation to compensate the owner, which might be enforced by suit in the Court of Claims.

So, too, in Hollister v. Benedict & B. Mfg. Co., 113 U. S. 59, 5 Sup. Ct. 717, 28 L. Ed. 901, it was held that a suit might be maintained in the Court of Claims to recover for the use of a patented invention, if the right of the patentee were acknowledged. To the same effect are United States v. Palmer, 128 U. S. 262, 9 Sup. Ct. 104, 32 L. Ed. 442, and United States v. Berdan Fire-Arms Mfg. Co., 156 U. S. 552, 15 Sup. Ct. 420, 39 L. Ed. 530.

In Medbury v. United States, 173 U. S. 492, 19 Sup. Ct. 503, 43 L. Ed. 779, it was held the Court of Claims had jurisdiction of an action to recover an excess of payment for lands within the limits of a railroad grant which grant was, subsequent to the payment, forfeited by act of Congress for nonconstruction of the road.

In Swift & C. & B. Co. v. United States, 111 U. S. 22, 4 Sup. Ct. 244, 28 L. Ed. 341, the same right was treated as existing in favor of a party who sued for a commission upon the amount of certain adhesive stamps which he had at one time purchased for his own use from the Bureau of Internal Revenue. See, also, United States v. Lawson, 101 U. S. 164, 25 L. Ed. 860; United States v. Mosby, 133 U. S. 273, 10 Sup. Ct. 327, 33 L. Ed. 625. * * *[67]

[67] German Civil Code, § 31: "An association is liable for the damage done to a third party by an actionable wrong committed by the governing body or one of its members or by a representative constituted in accordance with its by-laws within the scope of the functions committed to such body, member or representative."

Section 89: "The rule of section 31 applies to the Fiskus (state) and to public corporations, trusts and institutions."

CHAPTER VIII

ACTIONS FOR SPECIFIC RELIEF

SECTION 42.—IN GENERAL

UNITED STATES v. JONES.

SAME v. TAUBENHEIMER. SAME v. MONTGOMERY.

(Supreme Court of United States, 1889. 131 U. S. 1, 9 Sup. Ct. 669, 33 L. Ed. 90.)

Appeals from the Circuit Court of the United States for the District of Oregon.

Three suits by Carrie Jones, Henry Taubenheimer, and James B. Montgomery, respectively, against the United States, for specific performance. Demurrers to the petitions overruled, and the United States appeals.

These cases are suits in equity brought against the United States under the recent act of March 3, 1887 (U. S. Comp. St. 1901, p. 752) extending the jurisdiction of claims against the government to the District and Circuit Courts of the United States. They are suits for specific performance, seeking to compel the United States to issue and deliver to the plaintiffs respectively patents for timber land, alleged to have been taken up and purchased by them under the act for the sale of timber lands in the states of California, Oregon, etc., passed June 3, 1878 (20 Stat. 89). The petitions contain averments of performance of the conditions required by said act, the payment of the price of the lands to the receiver of the land office, the giving of his certificates and receipts therefor, and the refusal of the government to issue patents to the petitioners as entitled thereto. They pray in each case for a decree—First, that the petitioner is owner of the land by virtue of the purchase; and, second, that the United States issue and deliver, or cause to be issued and delivered, in accordance with law, a patent granting and conveying the land purchased. The United States, by its attorney, demurred to the several petitions. The Circuit Court overruled the demurrers, and rendered decrees for the plaintiffs. From these decrees the present appeals were taken.

BRADLEY, J. The question involved is whether the act of March 3, 1887, which is entitled "An act to provide for the bringing of suits against the government of the United States" (24 Stat. 505 [U. S. Comp. St. 1901, p. 752]), authorizes suits of the kind like the present, which are brought, not for the recovery of money,

but for equitable relief by specific performance, to compel the issue and delivery of a patent. In the case of U. S. v. Alire, 6 Wall. 573, 18 L. Ed. 947, we distinctly held that the acts of 1855 and 1863, which established the Court of Claims, and defined its jurisdiction, did not give it power to entertain any such suits as these; and that case was followed by Bonner v. U. S., 9 Wall. 156, 19 L. Ed. 666, and has been approved in subsequent cases. U. S. v. Gillis, 95 U. S. 407, 412, 24 L. Ed. 503; U. S. v. Schurz, 102 U. S. 378, 404, 26 L. Ed. 167.

It is argued, however, that the new law has extended the jurisdiction of the Court of Claims and the concurrent jurisdiction of the Circuit and District Courts, or at least the latter, so as to embrace every kind of claim, equitable as well as legal, and specific relief, or a recovery of property, as well as a recovery of money. If such is the legislative will, of course the courts must conform to it, although the management and disposal of the public domain, in which the newly claimed jurisdiction would probably be most frequently called into exercise, has always been regarded as more appropriately belonging to the political department of the government than to the courts, and more a matter of administration than judicature. A careful examination of the statute, and a comparison of its terms with those of the acts of 1855 and 1863, can alone settle the question.

By the first section of the act of 1855 (10 Stat. 612) it was enacted that a court should be established, to be called the "Court of Claims," the jurisdiction of which was defined as follows: "The said court shall hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, which may be suggested to it by a petition filed therein; and also all claims which may be referred to it by either house of Congress."

The act of March 3, 1863, passed to amend the act of 1855 (12 Stat. 765), added: "That the said court * * * shall also have jurisdiction of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever, on the part of the government against any person making claim against the government in said court." Jurisdiction was subsequently given of claims for the proceeds of property captured or abandoned during the Rebellion, and of claims of paymasters and other disbursing officers for relief from responsibility on account of capture of government funds or property in their hands. These latter branches of jurisdiction need not be considered here.

Turning now to the act of March 3, 1887, which re-enacted or revised the previous laws as to the jurisdiction of the Court of Claims, and conferred concurrent jurisdiction for limited amounts on the ordinary courts, we find the following language used:

"The Court of Claims shall have jurisdiction to hear and determine

the following matters: First. All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an executive department, or upon any contract, expressed or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable. * * * Second. All set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the government of the United States against any claimant against the government in said court."

"Sec. 2. That the District Courts of the United States shall have concurrent jurisdiction with the Court of Claims as to all matters named in the preceding section where the amount of the claim does not exceed one thousand dollars, and the Circuit Courts of the United States shall have such concurrent jurisdiction in all cases where the amount of such claim exceeds one thousand dollars, and does not exceed ten thousand dollars."

The jurisdiction here given to the Court of Claims is precisely the same as that given in the acts of 1855 and 1863, with the addition that it is extended to "damages * * * in cases not sounding in tort" and to claims for which redress may be had "either in a court of law, equity, or admiralty." "Damages in cases not sounding in tort"—that is to say, damages for breach of contract—had already been held to be recoverable against the government under the former acts. U. S. v. Behan, 110 U. S. 338, 4 Sup. Ct. 81, 28 L. Ed. 168; U. S. v. Manufacturing Co., 112 U. S. 645, 5 Sup. Ct. 306, 28 L. Ed. 846; Hollister v. Manufacturing Co., 113 U. S. 59, 67, 5 Sup. Ct. 717, 28 L. Ed. 901. "Claims" redressible "in a court of law, equity, or admiralty," may be claims for money only, or they may be claims for property or specific relief according as the context of the statute may require or allow.

The claims referred to in the original statute of 1855, as described in the first section thereof, above quoted, might have included claims for other things besides money; but various provisions of that act and of the act of March 3, 1863, were inconsistent with the enforcement of any claims under the law except claims for money. Thus, in the fifth section of the act of 1863, the right of appeal was limited to cases in which the amount in controversy exceeded $3,000, and in the seventh section it was provided that if judgment should be given in favor of the claimant, the sum due thereby should be paid out of any general appropriation made by law for the payment of private claims; and, if a judgment was affirmed on appeal, interest was to be allowed thereon, etc.

In the case of U. S. v. Alire, 6 Wall. 573, 18 L. Ed. 947, Mr. Justice Nelson, speaking for the court, said: "It will be seen by the

above reference which we have made to the two acts of Congress on this subject that the only judgments which the Court of Claims are authorized to render against the government, or over which the Supreme Court have any jurisdiction on appeal, or for the payment of which by the Secretary of the Treasury any provision is made, are judgments for money found due from the government to the petitioner. And although it is true that the subject-matter over which jurisdiction is conferred, both in the act of 1855 and of 1863, would admit of a much more extended cognizance of cases, yet it is quite clear that the limited power given to render a judgment necessarily retains the general terms, and confines the subject-matter to cases in which the petitioner sets up a moneyed demand as due from the government." The decree of the Court of Claims in that case was that the claimant recover of the government a military land warrant for 160 acres of land, and that it be made out and delivered to him by the proper officer. This court said: "We find no provision in any of the statutes requiring a judgment of this character, whether in this court or in the Court of Claims, to be obeyed or satisfied."

The sections of the act of 1863 referred to in this opinion are still in force, not being repealed by the act of 1887, which only repeals "all laws and parts of laws inconsistent" therewith. Section 5, relating to appeals, is transferred to section 707 of the Revised Statutes (U. S. Comp. St. 1901, p. 574), giving an appeal to this court "where the amount in controversy exceeds $3,000"; and section 7, relating to the mode of paying judgments out of a general appropriation, and allowing interest where a judgment is affirmed, is contained in sections 1089, 1090 of the Revised Statutes (U. S. Comp. St. 1901, p. 745). These sections are still the law on the subjects to which they relate, being necessary to the completion of the system, and not being supplied by any other enactments. Indeed, they are expressly retained. The fourth section of the act of 1887 declares that "the jurisdiction of the respective courts of the United States proceeding under this act, including the right of exception and appeal, shall be governed by the law now in force, in so far as the same is applicable, and not inconsistent with the provisions of this act"; and the ninth section declares "that the plaintiff or the United States, in any suit brought under the provisions of this act, shall have the same rights of appeal or writ of error as are now reserved in the statutes of the United States in that behalf made, and upon the conditions and limitations therein contained." These provisions undoubtedly include the Court of Claims as well as the District and Circuit Courts. So, in relation to interest, section 10 declares that "from the date of such final judgment or decree interest shall be computed thereon at the rate of four per cent. per annum, until the time when an appropriation is made for the payment of the judgment or decree." It seems, therefore, that in the point of provid-

ing only for money decrees and money judgments, the law is unchanged, merely being so extended as to include claims for money arising out of equitable and maritime as well as legal demands.

We do not think that it was the intention of Congress to go further than this. Had it been, some provision would have been made for carrying into execution decrees for specific performance, or for delivering the possession of property recovered in kind. The general scope and purport of the act are against any further extension than that here indicated. The expression in the fifth section, referring to "money or any other thing claimed, or the damages sought to be recovered," on which so much reliance is placed by the appellees, cannot outweigh the considerations referred to, and operate to introduce entirely new fields of jurisdiction. It is one of those general expressions which must be restrained by the more special and definite indications of intention furnished by the context.

We cannot yield to the suggestion that any broader jurisdiction as to subject-matter is given to the Circuit and District Courts than that which is given to the Court of Claims. It is clearly the same jurisdiction—"concurrent jurisdiction" only—within certain limits as to amount; and the language in which those limits are expressed furnishes an additional argument in favor of the conclusion which we have reached. It is declared "that the District Courts of the United States shall have concurrent jurisdiction with the Court of Claims * * * where the amount of the claim does not exceed $1,000," etc. This language is properly applicable only to a money claim. Had anything but money been in the legislative mind the language would have been, "where the amount or value of the thing claimed does not exceed $1,000," etc.

Of course, our province is construction only; the policy of the law is the prerogative of the legislative department. But, notwithstanding the glowing terms in which able jurists have spoken of the progress of civilization and enlightened government as exhibited in subjecting government itself, equally with individuals, to the jurisdiction of its own courts, we should have been somewhat surprised to find that the administration of vast public interests, like that of the public lands, which belong so appropriately to the political department, had been cast upon the courts—which it surely would have been, if such a wide door had been opened for suing the government to obtain patents and establish land claims, as the counsel for the appellees in these cases seems to imagine. We are satisfied that the door has not yet been thrown open thus wide.

The decrees of the court are reversed in all the cases, and the causes are respectively remanded, with instructions to dismiss the original petitions or bills.

MILLER, J. (dissenting). I find myself unable to concur with the majority of the court in the construction given by it in the opinion just read to the provisions of the act of March 3, 1887. This act was

evidently intended to confer a new and important jurisdiction upon the Court of Claims, and a concurrent jurisdiction, to a limited extent, in the same class of cases, upon the Circuit and District Courts of the United States. I can see no other possible object in that part of the statute which confers this new jurisdiction by the use of language which for the first time in the history of that court authorizes it to take cognizance of claims where the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, than to make them suable in such cases. To hold that the distinct grant of power here provided for is controlled by the fact that this court has under former statutes decided that it did not then exist, is simply to nullify this new grant of power. The manifest purpose of this new act was to confer power which the Court of Claims did not previously have, and to authorize it to take jurisdiction of a class of cases of which it had not cognizance before. To say that under such circumstances the new statute is to be crippled and rendered ineffectual in the only new feature which it has, in regard to the jurisdiction of that court, is, in my mind, a refusal to obey the law as made by Congress in the matter in which its power is undisputed. It is clear to me that Congress intended by this act to enlarge very materially the right of suit against the United States, to facilitate this right by allowing suits to be brought in the Circuit and District Courts where the parties resided, and that it also designed to enlarge the remedy in the Court of Claims to meet all such cases in law, equity, and admiralty against the United States, as would be cognizable in such courts against individuals.

I am authorized to say that Mr. Justice FIELD agrees with me in this dissent.[1]

UNITED STATES v. LEE.

KAUFMAN et al. v. SAME.

(Supreme Court of United States, 1882. 106 U. S. 196, 1 Sup. Ct. 240, 27 L. Ed. 171.)

In Error to the Circuit Court of the United States for the Eastern District of Virginia.

MILLER, J.[2] These are two writs of error to the same judgment, one prosecuted by the United States, eo nomine, and the other by the Attorney General of the United States in the names of Frederick

[1] In 1892 a bill was passed by Congress conferring jurisdiction in the matter of land patents, but it was vetoed by President Harrison. President's Messages, vol. 9, p. 247, August 3, 1892. See Noble v. Union River Logging R. Co., 147 U. S. 165, 13 Sup. Ct. 271, 37 L. Ed. 123 (1893), post, p. 638; United States ex rel. Riverside Oil Co. v. Hitchcock, 190 U. S. 316, 23 Sup. Ct. 698, 47 L. Ed. 1074 (1903).

[2] Only a portion of the opinion of Miller, J., is printed.

Kaufman and Richard P. Strong, the defendants against whom judgment was rendered in the Circuit Court. The action was originally commenced in the circuit court for the county of Alexandria, in the state of Virginia, by the present defendant in error, against Kaufman and Strong and a great number of others, to recover possession of a parcel of land of about 1,100 acres, known as the Arlington estate. It was an action of ejectment in the form prescribed by the statutes of Virginia, under which the pleadings are in the names of the real parties plaintiff and defendant. As soon as the declaration was filed in that court the case was removed into the Circuit Court of the United States by writ of certiorari, where all the subsequent proceedings took place. It was tried by a jury, and during the progress of the trial an order was made, at the request of the plaintiff, dismissing the suit as to all of the defendants except Kaufman and Strong. Against each of these a judgment was rendered for separate parcels of the land in controversy, namely, against Kaufman for about 200 acres of it, constituting the national cemetery and included within its walls, and against Strong for the remainder of the tract, except 17 acres in the possession of Maria Syphax.

As the United States was not a party to the suit below, and, while defending the action by its proper law officers, expressly declined to submit itself as a defendant to the jurisdiction of the court, there may exist some doubt whether it has a right to prosecute the writ of error in its own name; but as the judgment against Kaufman and Strong is here on their writ of error, and as under that writ all the questions are raised which can be raised under the other, their writ being prosecuted in the interest of the United States, and argued here by the Solicitor General, the point is immaterial, and the question has not been mooted. The first step taken in the case, after it came into the Circuit Court of the United States, was the filing in the clerk's office of that court of the following paper by the Attorney General:

"George W. C. Lee v. Frederick Kaufman, R. P. Strong, and Others.
(In Ejectment.)

"And now comes the Attorney General of the United States and suggests to the court and gives it to understand and be informed (appearing only for the purpose of this motion) that the property in controversy in this suit has been for more than 10 years and now is held, occupied, and possessed by the United States, through its officers and agents, charged in behalf of the government of the United States with the control of the property, and who are in the actual possession thereof, as public property of the United States, for public uses, in the exercise of their sovereign and constitutional powers, as a military station, and as a national cemetery established for the burial of deceased soldiers and sailors, and known and designated as the 'Arlington Cemetery,' and for the uses and purposes set forth in the certificate of sale, a copy of which, as stated and prepared by

the plaintiff, and which is a true copy thereof, is annexed hereto and filed herewith, under claim of title, as appears by the said certificate of sale, and which was executed, delivered, and recorded as therein appears.

"Wherefore, without submitting the rights of the government of the United States to the jurisdiction of the court, but respectfully insisting that the court has no jurisdiction of the subject in controversy, he moves that the declaration in said suit be set aside, and all the proceedings be stayed and dismissed, and for such other order as may be proper in the premises. "Chas. Devens, Atty. Gen. U. S."

The plaintiff demurrer to this suggestion, and, on hearing, the demurrer was sustained. The case was thereupon tried before a jury on the general issue pleaded by defendants Kaufman and Strong, in the course of which the question raised by this suggestion of the Attorney General was again presented to the court by prayers for instruction, which were rejected, and exceptions taken.

The plaintiff offered evidence establishing title in himself by the will of his grandfather, George Washington Parke Custis, who devised the Arlington estate to his daughter, the wife of Gen. Robert E. Lee, for life, and after her death to the plaintiff. This, with the long possession under that title, made a prima facie right of recovery in plaintiff. The title relied on by defendants was a tax sale certificate made by the commissioners appointed under the act of Congress of June 7, 1862, "for the collection of direct taxes in the insurrectionary districts within the United States," as amended by the act of February 6, 1863. At this sale the land was bid in by said commissioners for the United States, and a certificate of that fact was given by these commissioners and introduced on the trial as evidence by defendants. If this sale was a valid sale, and the certificate conveyed a valid title, then the title of plaintiff was thereby divested, and he could not recover. If the proceedings evidenced by the tax sale did not transfer the title of the property to the United States, then it remained in the plaintiff, and, so far as the question of title was concerned, his recovery was a rightful one.

We have then two questions presented to the court and jury below, and the same questions arise in this court on the record: (1) Could any action be maintained against the defendants for the possession of the land in controversy under the circumstances of the relation of that possession to the United States, however clear the legal right to that possession might be in plaintiff? (2) If such an action could be maintained, was the prima facie title of plaintiff divested by the tax sale and the certificate given by the commissioners? It is believed that no division of opinion exists among the members of this court on the proposition that the rulings of law under which the latter question was submitted by the court to the jury was sound, and that the jury were authorized to find, as they evidently did find, that

the tax certificate and the sale which it recited did not divest the plaintiff of his title to the property.

For this reason we will consider first the assignment of errors on that subject. * * * In approaching the other question which we are called on to decide, it is proper to make a clear statement of what it is.

The counsel for plaintiffs in error, and in behalf of the United States, assert the proposition, that though it has been ascertained by the verdict of the jury, in which no error is found, that the plaintiff has the title to the land in controversy, and that what is set up in behalf of the United States is no title at all, the court can render no judgment in favor of the plaintiff against the defendants in the action, because the latter hold the property as officers and agents of the United States, and it is appropriated to lawful public uses. This proposition rests on the principle that the United States cannot be lawfully sued without its consent in any case, and that no action can be maintained against any individual without such consent, where the judgment must depend on the right of the United States to property held by such persons as officers or agents for the government. The first branch of this proposition is conceded to be the established law of this country and of this court at the present day; the second, as a necessary or proper deduction from the first, is denied.

In order to decide whether the inference is justified from what is conceded, it is necessary to ascertain, if we can, on what principle the exemption of the United States from a suit by one of its citizens is founded, and what limitations surround this exemption. In this, as in most other cases of like character, it will be found that the doctrine is derived from the laws and practices of our English ancestors; and while it is beyond question that from the time of Edward I until now the king of England was not suable in the courts of that country, except where his consent had been given on petition of right, it is a matter of great uncertainty whether prior to that time he was not suable in his own courts and in his kingly character as other persons were. We have the authority of Chief Baron Comyn, 1 Dig. 132, "Action, C 1," and 6 Dig. 67, "Prerogative," and of the Mirror of Justices, c. 1, § 3, and chapter 5, § 1, that such was the law, and of Bracton and Lord Holt that the king never was suable of common right. It is certain, however, that after the establishment of the petition of right about that time, as the appropriate manner of seeking relief where the ascertainment of the parties' rights required a suit against the king, no attempt has been made to sue the king in any court except as allowed on such petition. It is believed that this petition of right, as it has been practiced and observed in the administration of justice in England, has been as efficient in securing the rights of suitors against the crown in all cases appropriate to judicial

proceedings, as that which the law affords in legal controversies between the subjects of the king among themselves. "If the mode of proceeding to enforce it be formal and ceremonious, it is, nevertheless, a practical and efficient remedy for the invasion by the sovereign power of individual rights." U. S. v. O'Keefe, 11 Wall. 178, 20 L. Ed. 131.

There is in this country, however, no such thing as the petition of right, as there is no such thing as a kingly head to the nation, or to any of the states which compose it. There is vested in no officer or body the authority to consent that the state shall be sued except in the lawmaking power, which may give such consent on the terms it may choose to impose. The Davis, 10 Wall. 15, 19 L. Ed. 875. Congress has created a court in which it has authorized suits to be brought against the United States, but has limited such suits to those arising on contract, with a few unimportant exceptions.

What were the reasons which forbid that the king should be sued in his own court, and how do these reasons apply to the political body corporate which we call the United States of America? As regards the king, one reason given by the old judges was the absurdity of the king's sending a writ to himself to command the king to appear in the king's court. No such reason exists in our government, as process runs in the name of the president and may be served on the attorney general, as was done in the case of Chisholm v. State of Georgia, 2 Dall. 419, 1 L. Ed. 440. Nor can it be said that the dignity of the government is degraded by appearing as a defendant in the courts of its own creation, because it is constantly appearing as a party in such courts, and submitting its rights as against the citizens to their judgment.

Mr. Justice Gray, of the Supreme Court of Massachusetts, in an able and learned opinion which exhausts the sources of information on this subject, says: "The broader reason is that it would be inconsistent with the very idea of supreme executive power, and would endanger the performance of the public duties of the sovereign, to subject him to repeated suits as a matter of right, at the will of any citizen, and to submit to the judicial tribunals the control and disposition of his public property, his instruments and means of carrying on his government in war and in peace, and the money in his treasury." Briggs v. The Light Boats, 11 Allen, 162. As we have no person in this government who exercises supreme executive power or performs the public duties of a sovereign, it is difficult to see on what solid foundation of principle the exemption from liability to suit rests. It seems most probable that it has been adopted in our courts as a part of the general doctrine of publicists, that the supreme power in every state, wherever it may reside, shall not be compelled, by process of courts of its own creation, to defend itself from assaults in those courts. [The opinion then reviews a number of earlier

American authorities, relying especially upon Meigs v. McClung's Lessee, 9 Cranch, 11, 3 L. Ed. 639, and Osborn v. United States Bank, 9 Wheat. 738, 6 L. Ed. 204. This portion of the opinion is omitted.]

Looking at the question upon principle, and apart from the authority of adjudged cases, we think it still clearer that this branch of the defense cannot be maintained. It seems to be opposed to all the principles upon which the rights of the citizen, when brought in collision with the acts of the government, must be determined. In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name. There remains to him but the alternative of resistance, which may amount to crime. The position assumed here is that, however clear his rights, no remedy can be afforded to him when it is seen that his opponent is an officer of the United States, claiming to act under its authority; for, as Chief Justice Marshall says, to examine whether this authority is rightfully assumed is the exercise of jurisdiction, and must lead to the decision of the merits of the question. The objection of the plaintiffs in error necessarily forbids any inquiry into the truth of the assumption that the parties setting up such authority are lawfully possessed of it, for the argument is that the formal suggestion of the existence of such authority forbids any inquiry into the truth of the suggestion.

But why should not the truth of the suggestion and the lawfulness of the authority be made the subject of judicial investigation? In the case supposed the court has before it a plaintiff capable of suing, a defendant who has no personal exemption from suit, and a cause of action cognizable in the court—a case within the meaning of that term, as employed in the Constitution and defined by the decisions of this court. It is to be presumed in favor of the jurisdiction of the court that the plaintiff may be able to prove the right which he asserts in his declaration. What is that right as established by the verdict of the jury in this case? It is the right to the possession of the homestead of plaintiff—a right to recover that which has been taken from him by force and violence, and detained by the strong hand. This right being clearly established, we are told that the court can proceed no further, because it appears that certain military officers, acting under the orders of the President, have seized this estate, and converted one part of it into a military fort and another into a cemetery. It is not pretended, as the case now stands, that the president had any lawful authority to do this, or that the legislative body could give him any such authority except upon payment of just compensation. The defense stands here solely upon the absolute immunity from judicial inquiry of every one who asserts authority from the executive branch of the government, however clear it may be made that the executive possessed no such power. Not

only that no such power is given, but that it is absolutely prohibited, both to the executive and the legislative, to deprive any one of life, liberty, or property without due process of law, or to take private property without just compensation.

These provisions for the security of the rights of the citizen stand in the Constitution in the same connection and upon the same ground as they regard his liberty and his property. It cannot be denied that both were intended to be enforced by the judiciary as one of the departments of the government established by that Constitution. As we have already said, the writ of habeas corpus has been often used to defend the liberty of the citizen, and even his life, against the assertion of unlawful authority on the part of the executive and the legislative branches of the government. See Ex parte Milligan, 4 Wall. 2, 18 L. Ed. 281, and the Case of Kilbourn, discharged from the custody of the sergeant at arms of the House of Representatives by Chief Justice Carter. Kilbourn v. Thompson, 103 U. S. 168, 26 L. Ed. 377.

No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.

Courts of justice are established, not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the government, and the docket of this court is crowded with controversies of the latter class. Shall it be said, in the face of all this, and of the acknowledged right of the judiciary to decide in proper cases, statutes which have been passed by both branches of Congress and approved by the President to be unconstitutional, that the courts cannot give remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the government without any lawful authority, without any process of law, and without any compensation, because the President has ordered it and his officers are in possession? If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights. It cannot be, then, that when in a suit between two citizens for the ownership of real estate, one of them has established his right to the possession of the property according to all the forms of judicial procedure, and by the verdict of a jury and the judgment of the court, the wrongful possessor can say successfully to the court, "Stop, here; I hold by order of the Presi-

dent, and the progress of justice must be stayed." That, though the nature of the controversy is one peculiarly appropriate to the judicial function, though the United States is no party to the suit, though one of the three great branches of the government to which by the constitution this duty has been assigned has declared its judgment after a fair trial, the unsuccessful party can interpose an absolute veto upon that judgment by the production of an order of the Secretary of War, which that officer had no more authority to make than the humblest private citizen.

The evils supposed to grow out of the possible interference of judicial action with the exercise of powers of the government essential to some of its most important operations will be seen to be small indeed compared to this evil, and much diminished, if they do not wholly disappear, upon a recurrence to a few considerations. One of these, of no little significance, is that during the existence of the government for now nearly a century under the present constitution, with this principle and the practice under it well established, no injury from it has come to that government. During this time at least two wars so serious as to call into exercise all the powers and all the resources of the government have been conducted to a successful issue. One of these was a great civil war, such as the world has seldom known, which strained the powers of the national government to their utmost tension. In the course of this war persons hostile to the Union did not hesitate to invoke the powers of the courts for their protection as citizens in order to cripple the exercise of the authority necessary to put down the rebellion, yet no improper interference with the exercise of that authority was permitted or attempted by the courts. Mississippi v. Johnson, 4 Wall. 475, 18 L. Ed. 437; Georgia v. Stanton, 6 Wall. 50, 18 L. Ed. 721; Same v. Grant, 6 Wall. 241, 18 L. Ed. 848; Ex parte Tarble, 13 Wall. 397, 20 L. Ed. 597.

Another consideration is that since the United States cannot be made a defendant to a suit concerning its property, and no judgment in any suit against an individual who has possession or control of such property can bind or conclude the government, as is decided by this court in the case of Carr v. U. S., 98 U. S. 433, 25 L. Ed. 209, already referred to, the government is always at liberty, notwithstanding any such judgment, to avail itself of all the remedies which the law allows to every person, natural or artificial, for the vindication and assertion of its rights. Hence, taking the present case as an illustration, the United States may proceed by a bill in chancery to quiet its title, in aid of which, if a proper case is made, a writ of injunction may be obtained. Or it may bring an action of ejectment, in which, on a direct issue between the United States as plaintiff and the present plaintiff as defendant, the title of the United States could be judicially determined. Or, if satisfied that its title

has been shown to be invalid, and it still desires to use the property, or any part of it, for the purposes to which it is now devoted, it may purchase such property by fair negotiation, or condemn it by a judicial proceeding, in which a just compensation shall be ascertained and paid according to the constitution.

If it be said that the proposition here established may subject the property, the officers of the United States, and the performance of their indispensable functions to hostile proceedings in the state courts, the answer is that no case can arise in a state court where the interests, the property, the rights, or the authority of the federal government may come in question, which cannot be removed into a court of the United States under existing laws. In all cases, therefore, where such questions can arise they are to be decided, at the option of the parties representing the United States, in courts which are the creation of the federal government. The slightest consideration of the nature, the character, the organization, and the powers of these courts will dispel any fear of serious injury to the government at their hands. While by the Constitution the judicial department is recognized as one of the three great branches among which all the powers and functions of the government are distributed, it is inherently the weakest of them all. Dependent as its courts are for the enforcement of their judgments upon officers appointed by the executive, and removable at his pleasure, with no patronage and no control of purse or sword, their power and influence rests solely upon the public sense of the necessity for the existence of a tribunal to which all may appeal for the assertion and protection of rights guaranteed by the Constitution and by the laws of the land, and on the confidence reposed in the soundness of their decisions and the purity of their motives. From such a tribunal no well-founded fear can be entertained of injustice to the government or purpose to obstruct or diminish its just authority.

The Circuit Court was competent to decide the issues in this case before the parties that were before it. In the principles on which these issues were decided no error has been found, and its judgment is affirmed.

Mr. Justice GRAY delivered a dissenting opinion, in which the CHIEF JUSTICE, Mr. Justice BRADLEY, and Mr. Justice WOODS concurred.[3]

[3] See observations of Justice Bradley in Carr v. United States, 98 U. S. 433, 437, 438, 25 L. Ed. 209 (1878); Hare, Constitutional Law, lecture 40, p. 887.

Followed: Tindal v. Wesley, 167 U. S. 204, 17 Sup. Ct. 770, 42 L. Ed. 137 (1897).

See Herr v. Central Kentucky Lunatic Asylum, 97 Ky. 458, 462, 30 S. W. 971 (28 L. R. A. 394, 53 Am. St. Rep. 414) (1895): "As a necessary consequence of exemption of the state from suit without its consent, an action nominally against an officer, but really against the state, to enforce performance of its obligation in its political capacity, cannot be maintained. But if of-

SECTION 43.—INJUNCTION—IN GENERAL

The following brief report indicates the use of injunctions against the action of administrative authorities at an early period:

BOX v. ALLEN, 1 Dickens, 49 (April 26, 1727): "Bill to be relieved against an order of the commissioners of sewers. Demurrer to so much of the bill as sought to alter any of the orders of the commissioners, or to return any money by them received, for that the remedy was at law, and no equity to be relieved in this court. The demurrer was overruled."

Generally speaking, however, such use is of relatively recent origin. See Kerrison v. Sparrow, Cooper's Cases in Chancery temp. Lord Eldon, 305 (1815); Movers v. Smedley, 6 Johns. Ch. (N. Y.) 28 (1822), Kent, Ch.: "This is not the case of a private trust, but the official act of a political body; and in the whole history of the English Court of Chancery there is no instance of the assertion of such a jurisdiction as is now contended for."

In many cases the remedy in equity has been applied without being questioned. See Cook Co. v. C., B. & Q. R. Co., 35 Ill. 460, 467; C., B. & Q. R. Co. v. Cole, 75 Ill. 591; Porter v. R., R. I., etc., R. Co., 76 Ill. 561; Hersey v. Board of Supervisors, 37 Wis. 75; Bank of Utica v. Utica, 4 Paige (N. Y.) 399, 27 Am. Dec. 71; Noble v. Union River Logging R. R., 147 U. S. 165, 13 Sup. Ct. 271, 37 L. Ed. 123, post, p. 638 (see Cruickshank v. Bidwell, 176 U. S. 73, 80, 20 L. Ed. 280, 44 L. Ed. 377); Minnesota v. Hitchcock, 185 U. S. 373, 22 Sup. Ct. 650, 46 L. Ed. 954 (see Oregon v. Hitchcock, 202 U. S. 60, 26 Sup. Ct. 568, 50 L. Ed. 935).

ficers or agents of the state invade private right in a mode not authorized by statute under which they claim to act, or if such statute is invalid, unquestionably the person injured has at least a preventive remedy, although the state may be affected by the proceeding, yet not a party to it."

See Saranac Land & Timber Co. v. Roberts, 195 N. Y. 303, 88 N. E. 753 (1909): "It may be conceded that the state was in possession through the agency of its forest commission; but nevertheless an action of ejectment brought against the commission would be in effect an action against the state itself, judgment wherein would operate to deprive it of the property it had acquired by purchase."

As to what constitutes a suit against the state, see, further, In re Ayers, 123 U. S. 443, 501, 8 Sup. Ct. 164, 31 L. Ed. 216 (1887); Fitts v. McGhee, 172 U. S. 516, 19 Sup. Ct. 269, 43 L. Ed. 535 (1899); Ex parte Young, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932 (1908); and an article by Judge Jacob Trieber in 41 Am. Law Review, p. 844, on "Suability of States by Individuals in the Courts of the United States."

Robertson, Civil Proceedings by and against the Crown, p. 332: "It is clear from the statements made above that a petition of right lies for the recovery of lands, but instances outside of the Year Books have not been numerous."

SECTION 44. — SAME — TO RESTRAIN POLITICAL ACTS AND REMOVAL FROM OFFICE

STATE OF GEORGIA v. STANTON.

(Supreme Court of United States, 1867. 6 Wall. 50, 18 L. Ed. 721.)

This was a bill filed April 15, 1867, in this court, invoking the exercise of its original jurisdiction, against Stanton, Secretary of War, Grant, General of the Army, and Pope, Major General, assigned to command of the Third military district, consisting of the states of Georgia, Florida and Alabama (a district organized under the Act of Congress of the 2d March, 1867, entitled "An act to provide for the more efficient government of the rebel states," and an act of the 23d of the same month supplementary thereto), for the purpose of restraining the defendants from carrying into execution the several provisions of these acts, acts known in common parlance as the "Reconstruction Acts." Both these acts had been passed over the President's veto. * * *

NELSON, J.[4] * * * By the second section of the third article of the Constitution "the judicial power extends to all cases, in law and equity, arising under the Constitution, the laws of the United States," etc., and, as applicable to the case in hand, "to controversies between a state and citizens of another state," which controversies, under the judiciary act, may be brought, in the first instance, before this court in the exercise of its original jurisdiction; and we agree that the bill filed presents a case which, if it be the subject of judicial cognizance, would, in form, come under a familiar head of equity jurisdiction—that is, jurisdiction to grant an injunction to restrain a party from a wrong or injury to the rights of another, where the danger, actual or threatened, is irreparable, or the remedy at law inadequate. But, according to the course of proceeding under this head in equity, in order to entitle the party to the remedy, a case must be presented appropriate for the exercise of judicial power; the rights in danger, as we have seen, must be rights of persons or property, not merely political rights, which do not belong to the jurisdiction of a court, either in law or equity.

The remaining question on this branch of our inquiry is whether, in view of the principles above stated, and which we have endeavored to explain, a case is made out in the bill of which this court can take judicial cognizance. In looking into it, it will be seen that we are called upon to restrain the defendants, who represent the executive authority of the government, from carrying into execution cer-

[4] Only a portion of the opinion is printed.

tain acts of Congress, inasmuch as such execution would annul and totally abolish the existing state government of Georgia, and establish another and different one in its place; in other words, would overthrow and destroy the corporate existence of the state, by depriving it of all the means and instrumentalities where by its existence might, and otherwise would, be maintained.

This is the substance of the complaint, and of the relief prayed for. The bill, it is true, sets out in detail the different and substantial changes in the structure and organization of the existing government, as contemplated in these acts of Congress, which, it is charged, if carried into effect by the defendants, will work this destruction. But they are grievances, because they necessarily and inevitably tend to the overthrow of the state as an organized political body. They are stated, in detail, as laying a foundation for the interposition of the court to prevent the specific execution of them, and the resulting threatened mischief. So in respect to the prayers of the bill. The first is that the defendants may be enjoined against doing or permitting any act or thing, within or concerning the state, which is or may be directed or required of them, by or under the two acts of Congress complained of; and the remaining four prayers are of the same character, except more specific as to the particular acts threatened to be committed.

That these matters, both as stated in the body of the bill and in the prayers for relief, call for the judgment of the court upon political questions, and, upon rights, not of persons or property, but of a political character, will hardly be denied. For the rights for the protection of which our authority is invoked are the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a state, with all its constitutional powers and privileges. No case of private rights or private property infringed, or in danger of actual or threatened infringement, is presented by the bill, in a judicial form, for the judgment of the court.

It is true the bill, in setting forth the political rights of the state and of its people to be protected, among other matters, avers that Georgia owns certain real estate and buildings therein, state capitol and executive mansion, and other real and personal property, and that putting the acts of Congress into execution, and destroying the state, would deprive it of the possession and enjoyment of its property. But it is apparent that this reference to property and statement concerning it are only by way of showing one of the grievances resulting from the threatened destruction of the state, and in aggravation of it, not as a specific ground of relief. This matter of property is neither stated as an independent ground nor is it noticed at all in the prayers for relief. Indeed, the case, as made in the bill, would have stopped far short of the relief sought by the state, and its main purpose and design given up, by restraining its remedial effect simply to the protection of the title and possession of its

property. Such relief would have called for a very different bill from the one before us.

Having arrived at the conclusion that this court, for the reasons above stated, possesses no jurisdiction over the subject-matter presented in the bill for relief, it is unimportant to examine the question as it respects jurisdiction over the parties defendants. * * *

Bill dismissed for want of jurisdiction.[5]

In re SAWYER et al.

(Supreme Court of United States, 1888. 124 U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402.)

Albert L. Parsons, police judge of the city of Lincoln, Neb., had been subjected to proceedings on the part of the mayor and the city council of said city looking to his removal from office. Claiming that such proceedings violated the provisions of the Constitution of the United States forbidding that any person should be deprived of life, liberty, or property without due process of law, as well as certain other provisions, he filed his bill in equity in the Circuit Court of the United States for the District of Nebraska, and obtained a pre-

[5] "The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department, though the acts of both, when performed, are, in proper cases, subject to its cognizance. The impropriety of such interference will be clearly seen upon consideration of its possible consequences. Suppose the bill filed and the injunction prayed for allowed. If the President refuse obedience, it is needless to observe that the court is without power to enforce its process. If, on the other hand, the President complies with the order of the court and refuses to execute the acts of Congress, is it not clear that a collision may occur between the executive and legislative departments of the government? May not the House of Representatives impeach the President for such refusal? And in that case could this court interfere, in behalf of the President, thus endangered by compliance with its mandate, and restrain by injunction the Senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered to the public world of an attempt by this court to arrest proceedings in that court? These questions answer themselves. It is true that a state may file an original bill in this court. And it may be true, in some cases, that such a bill may be filed against the United States. But we are fully satisfied that this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties, and that no such bill ought to be received by us. It has been suggested that the bill contains a prayer that, if the relief sought cannot be had against Andrew Johnson, as President, it may be granted against Andrew Johnson as a citizen of Tennessee. But it is plain that relief as against the execution of an act of Congress by Andrew Johnson is relief against its execution by the President. A bill praying an injunction against the execution of an act of Congress by the incumbent of the presidential office cannot be received, whether it describes him as President or as a citizen of a state. The motion for leave to file the bill is therefore denied." State of Mississippi v. Johnson, 4 Wall. 475, 500, 18 L. Ed. 437 (1866).

In Wisconsin, the Supreme Court exercises original jurisdiction in equity for the purpose of determining the legality of the action of the Secretary of State in recognizing one of two rival factors as the regular party organization. State ex rel. Cook v. Houser, 122 Wis. 534, 100 N. W. 964 (1904).

liminary injunction restraining the mayor and eleven members of the city council from proceeding further in said matter. The mayor and the council, in disregard of the injunction, proceeded with the charges, and Parsons was forcibly removed from office. The Circuit Court thereupon issued a rule to the mayor and councilmen to show cause why they should not be attached for contempt. Upon hearing, they were adjudged guilty of contempt, and, failing to pay the fines imposed upon them, were taken and held in custody by the marshal. They thereupon petitioned the Supreme Court of the United States for a writ of habeas corpus.[6]

GRAY, J.[7] The question presented by this petition of the mayor and councilmen of the city of Lincoln for a writ of habeas corpus is whether it was within the jurisdiction and authority of the Circuit Court of the United States, sitting as a court of equity, to make the order under which the petitioners are held by the marshal.

Under the Constitution and laws of the United States, the distinction between common law and equity, as existing in England at the time of the separation of the two countries, has been maintained, although both jurisdictions are vested in the same courts. Fenn v. Holme, 21 How. 481, 484–487, 16 L. Ed. 198; Thompson v. Railroad Co., 6 Wall. 134, 18 L. Ed. 765; Heine v. Levee Com'rs, 19 Wall. 655, 22 L. Ed. 223.

The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property. It has no jurisdiction over the prosecution, the punishment, or the pardon of crimes or misdemeanors, or over the appointment and removal of public officers. To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses, or for the removal of public officers, is to invade the domain of the courts of common law, or of the executive and administrative department of the government.

Any jurisdiction over criminal matters that the English Court of Chancery ever had became obsolete long ago, except as incidental to its peculiar jurisdiction for the protection of infants, or under its authority to issue writs of habeas corpus for the discharge of persons unlawfully imprisoned. 2 Hale, P. C. 147; Gee v. Pritchard, 2 Swanst. 402, 413; 1 Spence, Eq. Jur. 689, 690; Attorney General v. Insurance Co., 2 Johns. Ch. (N. Y.) 371, 378.

From long before the Declaration of Independence, it has been settled in England that a bill to stay criminal proceedings is not within the jurisdiction of the Court of Chancery, whether those proceedings are by indictment or by summary process.

Lord Chief Justice Holt, in declining, upon a motion in the Queen's Bench for an attachment against an attorney for professional mis-

[6] The statement of facts found in the report of this case is omitted, a briefer summary thereof being substituted therefor.

[7] Only a portion of the opinion is printed.

conduct, to make it a part of the rule to show cause that he should not move for an injunction in chancery in the mean time, said: "Sure, chancery would not grant an injunction in a criminal matter under examination in this court; and, if they did, this court would break it, and protect any that would proceed in contempt of it." Holderstaffe v. Saunders, Holt. 136, 6 Mod. 16.

Lord Chancellor Hardwicke, while exercising the power of the Court of Chancery, incidental to the disposition of a case pending before it, of restraining a plaintiff who had, by his bill, submitted his rights to its determination, from proceeding as to the same matter before another tribunal, either by indictment or by action, asserted in the strongest terms the want of any power or jurisdiction to entertain a bill for an injunction to stay criminal proceedings, saying: "This court has not originally and strictly any restraining power over criminal prosecutions." And again: "This court has no jurisdiction to grant an injunction to stay proceedings on a mandamus, nor to an indictment, nor to an information, nor to a writ of prohibition, that I know of." Mayor, etc., v. Pilkington, 2 Atk. 302, 9 Mod. 273; Montague v. Dudman, 2 Ves. Sr. 396, 398.

The modern decisions in England, by eminent equity judges, concur in holding that a court of chancery has no power to restrain criminal proceedings, unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there. Attorney General v. Cleaver, 18 Ves. 211, 220; Turner v. Turner, 15 Jur. 218; Saull v. Browne, 10 Ch. App. 64; Kerr v. Preston, 6 Ch. Div. 463.

Mr. Justice Story, in his Commentaries on Equity Jurisprudence, affirms the same doctrine. 2 Story, Eq. Jur. § 893. And in the American courts, so far as we are informed, it has been strictly and uniformly upheld, and has been applied alike whether the prosecutions or arrests sought to be restrained arose under statutes of the state, or under municipal ordinances. West v. Mayor, etc., 10 Paige (N. Y.) 539; Davis v. American Soc., 75 N. Y. 362; Tyler v. Hamersley, 44 Conn. 419, 422, 26 Am. Rep. 479; Stuart v. Board Sup'rs, 83 Ill. 341, 25 Am. Rep. 397; Devron v. First Municipality, 4 La. Ann. 11; Levy v. Shreveport, 27 La. Ann. 620; Moses v. Mayor, etc., 52 Ala. 198; Gault v. Wallis, 53 Ga. 675; Phillips v. Mayor, etc., 61 Ga. 386; Cohen v. Goldsboro Com'rs, 77 N. C. 2; Oil Co. v. Little Rock, 39 Ark. 412; Spink v. Francis (C. C.) 19 Fed. 670, and 20 Fed. 567; Suess v. Noble (C. C.) 31 Fed. 855.

It is equally well settled that a court of equity has no jurisdiction over the appointment and removal of public officers, whether the power of removal is vested, as well as that of appointment, in executive or administrative boards or officers, or is intrusted to a judicial tribunal. The jurisdiction to determine the title to a public office belongs exclusively to the courts of law, and is exercised either

by certiorari, error, or appeal, or by mandamus, prohibition, quo warranto, or information in the nature of a writ of quo warranto, according to the circumstances of the case, and the mode of procedure, established by the common law or by statute.

No English case has been found of a bill for an injunction to restrain the appointment or removal of a municipal officer. But an information in the Court of Chancery for the regulation of Harrow School, within its undoubted jurisdiction over public charities, was dismissed so far as it sought a removal of governors unlawfully elected, Sir William Grant saying: "This court, I apprehend, has no jurisdiction with regard either to the election or the amotion of corporators of any description." Attorney General v. Clarendon, 17 Ves. 491, 498.

In the courts of the several states, the power of a court of equity to restrain by injunction the removal of a municipal officer has been denied in many well-considered cases.

Upon a bill in equity in the Court of Chancery of the state of New York by a lawfully appointed inspector of flour, charging that he had been ousted of his office by one unlawfully appointed in his stead by the Governor, and that the new appointee was insolvent, and praying for an injunction, a receiver, and an account of fees, until the plaintiff's title to the office could be tried at law, Vice Chancellor McCoun said: "This court may not have jurisdiction to determine that question, so as to render a judgment or a decree of ouster of the office." But he overruled a demurrer, upon the ground that the bill showed a prima facie title in the plaintiff. Tappan v. Gray, 3 Edw. Ch. (N. Y.) 450. On appeal, Chancellor Walworth reversed the decree, "upon the ground that at the time of the filing of this bill the Court of Chancery had no jurisdiction or power to afford him any relief." 9 Paige, 507, 509, 512. And the chancellor's decree was unanimously affirmed by the Court of Errors, upon Chief Justice Nelson's statement that he concurred with the Chancellor respecting the jurisdiction of courts of equity in cases of this kind. 7 Hill, 259.

The Supreme Court of Pennsylvania has decided that an injunction cannot be granted to restrain a municipal officer from exercising an office which he has vacated by accepting another office, or from entering upon an office under an appointment by a town council, alleged to be illegal; but that the only remedy in either case is at law by quo warranto. Hagner v. Heyberger, 7 Watts & S. (Pa.) 104, 42 Am. Dec. 220; Updegraff v. Crans, 47 Pa. 103.

The Supreme Court of Iowa, in a careful opinion delivered by Judge Dillon, has adjudged that the right to a municipal office cannot be determined in equity upon an original bill for an injunction. Cochran v. McCleary, 22 Iowa, 75.

In Delahanty v. Warner, 75 Ill. 185, 20 Am. Rep. 237, it was decided that a court of chancery had no jurisdiction to entertain a bill

for an injunction to restrain the mayor and aldermen of a city from unlawfully removing the plaintiff from the office of superintendent of streets, and appointing a successor; but that the remedy was at law by quo warranto or mandamus.

In Sheridan v. Colvin, 78 Ill. 237, it was held that a court of chancery had no jurisdiction to restrain by injunction a city council from passing an ordinance unlawfully abolishing the office of commissioner of police; and the court, repeating in great part the opening propositions of Kerr on Injunctions, said: "It is elementary law that the subject-matter of the jurisdiction of a court of chancery is civil property. The court is conversant only with questions of property and the maintenance of civil rights. Injury to property, whether actual or prospective, is the foundation on which the jurisdiction rests. The court has no jurisdiction in matters merely criminal or merely immoral, which do not affect any right to property; nor do matters of a political nature come within the jurisdiction of the Court of Chancery; nor has the Court of Chancery jurisdiction to interfere with the duties of any department of government, except under special circumstances, and when necessary for the protection of rights of property." 78 Ill. 247.

Upon like grounds it was adjudged in Dickey v. Reed, 78 Ill. 261, that a court of chancery had no power to restrain by injunction a board of commissioners from canvassing the results of an election; and that orders granting such an injunction, and adjudging the commissioners guilty of contempt for disregarding it, were wholly void. And in Harris v. Schryock, 82 Ill. 119, the court, in accordance with its previous decisions, held that the power to hold an election was political, and not judicial, and therefore a court of equity had no authority to restrain officers from exercising that power.

Similar decisions have been made, upon full consideration, by the Supreme Court of Alabama, overruling its own prior decisions to the contrary. Beebe v. Robinson, 52 Ala. 66; Moulton v. Reid, 54 Ala. 320.

The statutes of Nebraska contain special provisions as to the removal of officers of a county or of a city. "All county officers, including justices of the peace, may be charged, tried, and removed from office for official misdemeanors" of certain kinds, by the board of county commissioners, upon the charge of any person. "The proceedings shall be as nearly like those in other actions as the nature of the case admits, excepting where otherwise provided in this chapter." "The complaint shall be by an accuser against the accused, and shall contain the charges with the necessary specifications under them, and be verified by the affidavit of any elector of the state that he believes the charges to be true." No formal answer or replication is required, "but, if there be an answer and reply, the provisions of this [the?] statute relating to pleadings in actions shall apply." "The questions of fact shall be tried as in other actions, and, if the accused is

found guilty, judgment shall be entered removing the officer from his office, and declaring the latter vacant, and the clerk shall enter a copy of the judgment in the election book." Neb. Comp. St. c. 18, art. 2, § 7.

The nature of this proceeding before county commissioners has been the subject of several decisions by the Supreme Court of the state. In the earliest one the court declared: "The proceeding is quasi criminal in its nature, and the incumbent undoubtedly may be required to appear without delay, and show cause why he should not be removed. But questions of fact must be tried as in other actions, and are subject to review on error. The right to a trial upon distinct and specific charges is secured to every one thus charged with an offense for which he is liable to be removed from office." "Neither is it sufficient for the board to declare and resolve that the office is vacant. There must be a judgment of ouster against the incumbent." State v. Sheldon, 10 Neb. 452, 456, 6 N. W. 757.

The authority conferred upon county commissioners to remove county officers has since been held not to be an exercise of strictly judicial power, within the meaning of that provision of the Constitution of Nebraska which requires that "the judicial power of this state shall be vested in a Supreme Court, district courts," and other courts and magistrates therein enumerated. Const. Neb. art. 6, § 1; State v. Oleson, 15 Neb. 247, 18 N. W. 45. But it has always been considered as so far judicial in its nature that the order of the county commissioners may be reviewed on error in the district court of the county, and ultimately in the supreme court of the state. State v. Sheldon, above cited; Minkler v. State, 14 Neb. 181, 15 N. W. 330; State v. Meeker, 19 Neb. 444, 448, 27 N. W. 427. See, also, Railroad v. Washington Co., 3 Neb. 30, 41; Code Civ. Proc. Neb. §§ 580–584, 599; Crim. Code, (Ed. 1885,) § 572.

This view does not substantially differ from that taken in other states, where similar orders have been reviewed by writ of certiorari, as proceedings of an inferior tribunal or board of officers, not commissioned as judges, yet acting judicially, and not according to the course of the common law. Charles v. Mayor, etc., 27 N. J. Law, 203; People v. Fire Com'rs, 72 N. Y. 445; Donahue v. County of Will, 100 Ill. 94.

In Nebraska, as elsewhere, the validity of the removal of a public officer, and the title of the person removed, or of a new appointee, to the office, may be tried by quo warranto or mandamus. Comp. St. Neb. c. 19, §§ 13, 24; Id. c. 71; Code Civ. Proc. §§ 645, 704; Cases of Sheldon, Oleson, and Meeker, above cited; Queen v. Saddlers' Co., 10 H. L. Cas. 404; Osgood v. Nelson, L. R. 5 H. L. 636. * * *

The whole object of the bill in equity filed by Parsons, the police judge of the city of Lincoln, against the mayor and councilmen of the city, upon which the Circuit Court of the United States made the order for the disregard of which they are in custody, is to prevent his re-

moval from the office of police judge. No question of property is suggested in the allegations of matters of fact in the bill, or would be involved in any decree that the court could make thereon.

The case stated in the bill is that charges in writing against Parsons for appropriating to his own use moneys of the city were filed, as required by the original ordinance, by Sheedy and Saunders (Hyatt, not otherwise named in those charges, would seem to have signed them as the additional witness required by that ordinance); that the charges were referred by the mayor to a committee of three members of the council; that upon notice to the accused, and his appearance before that committee, he objected that the committee had no authority to try the charges, and the committee so reported to the council; that thereupon Sheedy and Saunders procured the passage of the amended ordinance, giving a committee, instead of the whole council, power to try the charges, and report its finding to the council; that after the passage of this ordinance, and against his protest, the committee resumed the trial, and, in order to favor and protect his accusers, and fraudulently to obtain his removal from office, made a report to the city council, falsely stating that they reported all the evidence, and fraudulently suppressing a book which he had offered in evidence, and finding him guilty, and recommending that his office be declared vacant, and be filled by the appointment of some other person; and that the mayor and city council set the matter down for final vote at a future day named, and threatened and declared that they would then, without hearing or reading the evidence taken before the committee, declare the office vacant, and appoint another person to fill it.

The bill prays for an injunction to restrain the mayor and councilmen of the city of Lincoln from proceeding any further with the charges against Parsons, or taking any vote on the report of the committee, or declaring the office of police judge vacant, or appointing any person to fill that office. * * *

It has been contended by both parties, in argument, that the proceeding of the city council for the removal of Parsons upon the charges filed against him is in the nature of a criminal proceeding; and that view derives some support from the judgment of the Supreme Court of Nebraska in State v. Sheldon, 10 Neb. 452, 456, 6 N. W. 757, before cited. But, if the proceeding is of a criminal nature, it is quite clear, for the reasons and upon the authorities set forth in the earlier part of this opinion, that the case stated in the bill is wholly without the jurisdiction of any court of equity.

If those proceedings are not to be considered as criminal or quasi criminal, yet if, by reason of their form and object, and the acts of the Legislature and decisions of the courts of Nebraska as to the appellate jurisdiction exercised in such cases by the judicial power of the state, they are to be considered as proceedings in a court of the state (of which we express no decisive opinion), the restraining order of the Circuit Court was void, because in direct contravention of the

peremptory enactment of Congress that the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except when authorized by a bankrupt act. Act March 2, 1793, c. 22, § 5 (1 St. 335); Diggs v. Walcott, 4 Cranch, 179, 2 L. Ed. 587; Peck v. Jenness, 7 How. 612, 625, 12 L. Ed. 841; Rev. St. § 720 (U. S. Comp. St. 1901, p. 581); Watson v. Jones, 13 Wall. 679, 719, 20 L. Ed. 666; Haines v. Carpenter, 91 U. S. 254, 23 L. Ed. 345; Dial v. Reynolds, 96 U. S. 340, 24 L. Ed. 644; Sargent v. Helton, 115 U. S. 348, 6 Sup. Ct. 78, 29 L. Ed. 412.

But if those proceedings are to be considered as neither criminal nor judicial, but rather in the nature of an official inquiry by a municipal board intrusted by law with the administration and regulation of the affairs of the city, still, their only object being the removal of a public officer from his office, they are equally beyond the jurisdiction and control of a court of equity.

The reasons which preclude a court of equity from interfering with the appointment or removal of public officers of the government from which the court derives its authority apply with increased force when the court is a court of the United States, and the officers in question are officers of a state. If a person claiming to be such an officer is, by the judgment of a court of the state, either in appellate proceedings or upon a mandamus or quo warranto, denied any right secured to him by the Constitution of the United States, he can obtain relief by a writ of error from this court.

In any aspect of the case, therefore, the Circuit Court of the United States was without jurisdiction or authority to entertain the bill in equity for an injunction. As this court has often said: "Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and, whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court; but, if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void." Elliott v. Peirsol, 1 Pet. 328, 340, 7 L. Ed. 164; Wilcox v. Jackson, 13 Pet. 498, 511, 10 L. Ed. 264; Hickey v. Stewart, 3 How. 750, 762, 11 L. Ed. 814; Thompson v. Whitman, 18 Wall. 457, 467, 21 L. Ed. 897.

We do not rest our conclusion in this case, in any degree, upon the ground, suggested in argument, that the bill does not show a matter in controversy of sufficient pecuniary value to support the jurisdiction of the Circuit Court, because an apparent defect of its jurisdiction in this respect, as in that of citizenship of parties, depending upon an inquiry into facts which might or might not support the jurisdiction, can be availed of only by appeal or writ of error, and does not render its judgment or decree a nullity. Prigg v. Adams, 2 Salk. 674, Carth. 274; Fisher v. Bassett, 9 Leigh (Va.) 119, 131–133, 33 Am. Dec. 227; Navigation Co. v. Homestead Co., 123 U. S. 552, 8 Sup. Ct. 217, 31 L. Ed. 202. Neither do we say that, in a case be-

longing to a class or subject which is within the jurisdiction both of courts of equity and of courts of law, a mistake of a court of equity, in deciding that in the particular matter before it there could be no full, adequate, and complete remedy at law, will render its decree absolutely void.

But the ground of our conclusion is, that whether the proceedings of the city council of Lincoln for the removal of the police judge, upon charges of misappropriating moneys belonging to the city, are to be regarded as in their nature criminal or civil, judicial or merely administrative, they relate to a subject which the Circuit Court of the United States, sitting in equity, has no jurisdiction or power over, and can neither try and determine for itself, nor restrain by injunction the tribunals and officers of the state and city from trying and determining. The case cannot be distinguished in principle from that of a judgment of the common bench in England in a criminal prosecution, which was coram non judice, or the case of a sentence passed by the Circuit Court of the United States upon a charge of an infamous crime, without a presentment or indictment by a grand jury. Case of the Marshalsea, 5 [10] Coke, 68, 76; Ex parte Wilson, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89; Ex parte Bain, 121 U. S. 1, 7 Sup. Ct. 781, 30 L. Ed. 849.

The Circuit Court being without jurisdiction to entertain the bill in equity for an injunction, all its proceedings in the exercise of the jurisdiction which it assumed are null and void. The restraining order, in the nature of an injunction it had no power to make. The adjudication that the defendants were guilty of a contempt in disregarding that order is equally void, their detention by the marshal under that adjudication is without authority of law, and they are entitled to be discharged. Ex parte Rowland, 104 U. S. 604, 26 L. Ed. 861; Ex parte Fisk, 113 U. S. 713, 5 Sup. Ct. 724, 28 L. Ed. 1117; In re Ayers, 123 U. S. 443, 507, 8 Sup. Ct. 164, 31 L. Ed. 216.

Writ of habeas corpus to issue.

WAITE, C. J. (dissenting). I am not prepared to decide that an officer of a municipal government cannot, under any circumstances, apply to a court of chancery to restrain the municipal authorities from proceeding to remove him from his office without the authority of law. There may be cases, in my opinion, when the tardy remedies of quo warranto, certiorari, and other like writs will be entirely inadequate. I can easily conceive of circumstances under which a removal, even for a short period, would be productive of irremediable mischief. Such cases may rarely occur, and the propriety of such an application may not often be seen; but if one can arise, and if the exercise of the jurisdiction can ever be proper, the proceedings of the court in due course upon a bill filed for such relief will not be void, even though the grounds on which it is asked may be insufficient. If the court can take jurisdiction of such a case under any

circumstances, it certainly must be permitted to inquire, when a bill of that character is filed, whether the case is one that entitles the party to the relief he asks, and, if necessary to prevent wrong in the meantime, to issue in its discretion a temporary restraining order for that purpose. Such an order will not be void, even though it may be found on examination to have been improvidently issued. While in force it must be obeyed, and the court will not be without jurisdiction to punish for its contempt.

Such, in my opinion, was this case, and I therefore dissent from the judgment which has been ordered.[8]

SECTION 45.—SAME—TO RESTRAIN ENFORCEMENT OF ORDINANCES

CITY OF CHICAGO v. CHICAGO CITY RY. CO.

(Supreme Court of Illinois, 1906. 222 Ill. 560, 78 N. E. 890.)

Bill by the Chicago City Railway Company and others against the City of Chicago to enjoin the enforcement of a city ordinance and to restrain the prosecution of certain suits for the recovery of penalties. From a decree in favor of complainants, defendant appeals. Bill dismissed.

CARTWRIGHT, J.[9] On October 23, 1905, the city council of the city of Chicago, appellant, passed an ordinance amending sections 1958

[8] Accord: White v. Berry, 171 U. S. 366, 18 Sup. Ct. 917, 43 L. Ed. 199 (1898).

As to the development of the legal conception of office, changing from a property right to a public function or position under the government, constituting neither property nor contract, see the following authorities:

Blackstone's Commentaries, II, 36, office one of incorporeal hereditaments; St. 5 & 6 Edw. IV, c. 16, offices concerning justice and revenue may not be sold, extended to all offices by St. 49 Geo. III, c. 126; Coke, Littleton, 36, grant of office concerning justice, revenue, commonwealth, or benefit of subject, void if to an incompetent person; Coke, Littleton, § 378, in an office concerning the commonwealth it is a condition in law that it be lawfully kept; Reynel's Case, 9 Coke Rep. 95a (1611), a judicial office not grantable for years, since otherwise it might vest in an executor.

Officers appointed durante bene placito, (revenue officers,) St. 14 Rich. II, c. 1. As to other royal appointments, see Smyth v. Latham, 9 Bing. 694 (1833); Shenton v. Smith [1895] App. Cas. 229, 235.

Corporate officers, inherent power of amotion, Rex. v. Richardson, 1 Burr. 517 (1758).

American theory: Hoke v. Henderson, 15 N. C. 1, 25 Am. Dec. 677 (1833); Butler v. Pennsylvania, 10 How. 402, 13 L. Ed. 472 (1850); Wilson v. North Carolina, 169 U. S. 586, 18 Sup. Ct. 435, 42 L. Ed. 865 (1898); Taylor v. Beckham, 178 U. S. 548, 20 Sup. Ct. 890, 1009, 44 L. Ed. 1187 (1900).

[9] Only a portion of the opinion is printed.

and 1959 of the Revised Municipal Code of the city, so as to read as follows: [Here follows the text of the ordinance, which makes certain provisions for the comfort and safety of passengers on street cars.]

The Chicago City Railway Company and the receivers of the Chicago Union Traction Company, appellees, filed their bill in this case in the circuit court of Cook county praying the court to enjoin appellant from enforcing said ordinance so far as it is designed to compel them to furnish a sufficient number of cars to carry passengers comfortably and without overcrowding, from prosecuting suits against them to enforce the payment of any penalty for any alleged violation of the provision in question, and from bringing any further suits or taking any steps or proceeding whatsoever thereunder.

The amended bill alleges that the provision requiring the appellees to furnish a sufficient number of cars to carry passengers comfortably and without overcrowding is void on three grounds, which are stated by their counsel in their brief and argument, as follows: "(1) That it is in violation of paragraph 96, art. 5, Cities and Villages Act (Hurd's Rev. St. 1905, c. 24, § 62), which provides that 'no fine or penalty shall exceed $200 for a single offense,' and also section 11 of article 2 of the Constitution, which provides that 'penalties shall be proportioned to the nature of the offense.' (2) That it is uncertain, in that it does not sufficiently define the offense for which its multiplied penalties are imposed, and is for that reason void. (3) That it is unreasonable, and therefore void."

The circuit court overruled appellant's demurrer to the bill as amended, and, appellant having elected to stand by the demurrer, the court entered a final decree finding that said provision of the ordinance is void, and enjoining appellant from enforcing or attempting to enforce the same, and from further prosecuting suits brought against the appellees.

The material facts alleged in the amended bill and admitted by the demurrer are: That before, and at the time of, the passage of the ordinance the Chicago City Railway Company, one of the complainants maintained and operated 220 miles of street railway on the streets in the south division of the city of Chicago; that the receivers of the Chicago Union Traction Company, the other complainant, maintained and operated 303.93 miles of street railway on the streets in the north and west divisions of the city, with terminal connections in the south division; that the business center of the city is in the south division, in what is known as the "down-town loop"; that complainants are the only surface street railways serving the city of Chicago, except 12 other lines of surface street railway operating in outlying districts and not owning down-town terminals; that complainants furnish transportation for more than 2,000,000 people, and for almost all the population of the city; that it is, and has been, the custom to permit passengers to stand in the aisles and on the

platforms, and all street cars are provided with straps and other devices to accommodate standing passengers; that complainants have made efforts to procure additional cars, but they can only be obtained by placing orders with street car builders and manufacturers from three to four months before the order can be filled; that during the rush hours of the day it is impossible to prevent congestion of travel in the business center; that congestion and disturbances are caused by various conditions set out in the bill; and that the ordinance is unreasonable, and therefore void as applied to complainants, because it is impossible for them to comply with it. The bill alleges that 60 suits have been brought against the Chicago City Railway Company by the defendant before a justice of the peace; that 100 like suits have been brought against the receivers; that a suit in debt has been brought against each complainant in the circuit court, and in each suit the declaration contains 25 counts for violations of the ordinance; and that the city intends to bring numerous other suits for like violations.

The efforts of counsel for appellees, in their brief and argument, are directed to giving such an interpretation to the ordinance as to render it void. They contend that it imposes a penalty of not less than $25 nor more than $100 daily for each one of the thousands of cars operated by them, respectively, in case one car is overcrowded, and therefore the penalty exceeds $200 for one offense and is not proportioned to the nature of the offense; that there is such uncertainty in the meaning of the words "comfortably" and "overcrowding" that the ordinance is void on that account; and that under the facts alleged in the bill the provision in question is unreasonable, and therefore void. The ground upon which they say that a court of equity ought to intervene and prevent enforcement of the ordinance is that these two complainants are members of a class, and that a multiplicity of suits will thereby be prevented. Counsel for appellant deny that the provision of the ordinance in question is void for any of the reasons assigned. They contend that the provision is a valid exercise of the police power; that it was enacted in the interest of the public health, safety, and welfare; that the prosecutions under it are of a criminal or quasi criminal nature; and that equity has no jurisdiction to enjoin the prosecution of suits of that nature.

It is settled beyond controversy that a court of equity has no jurisdiction to interfere with prosecutions for criminal offenses, and it makes no difference whether the prosecution is under a statute which applies to the state at large or under an ordinance which is in force only in a particular municipality. Courts of equity deal only with civil and property rights, and their powers do not extend to determining what laws or ordinances are valid or invalid unless such determination is incidental to the protection of rights recognized by courts of equity alone. * * *

In the bill in this case no facts are stated which would constitute an irreparable injury to complainants. Many suits have been instituted, but the imposition of many penalties for many violations of an ordinance does not amount to irreparable injury. An offender cannot, by multiplying his offense, invoke the aid of a court of equity. Moses v. Mayor of Mobile, 52 Ala. 198. If a court could take jurisdiction of a bill to declare an ordinance void because of the numerous prosecutions under it, a complainant would be able to confer jurisdiction by repeating his offense, and of course that could not be so. The fact that a great many suits had been brought against a single party was regarded as a sufficient cause for enjoining the prosecution of all the suits but one in the case of Third Avenue Railroad Co. v. Mayor of New York, 54 N. Y. 159. The city had brought 77 suits in a justice's court to recover penalties for violating city ordinances concerning the running of cars without a license. The railroad company brought its suit to secure an injunction against all of the suits except one, and offered to abide the final decision of that one. The relief was granted upon the ground that a justice's court had no power to consolidate the actions.

But this court held a different doctrine in the case of Chicago, Burlington & Quincy Railroad Co. v. City of Ottawa, 148 Ill. 397, 36 N. E. 85. In that case there were prosecutions before a justice of the peace for violations of an ordinance, and appeals were taken from judgments rendered. Ten other suits were begun, returnable on successive days, Sundays excepted, and the prayer of the bill was that the defendant be restrained from prosecuting under the ordinance, and for a temporary writ restraining the city from prosecuting any other suits except the two then pending on appeal in the circuit court. The court held that every question arising in the suits could be settled and determined on the trial of a case in the circuit court, which was entirely competent to decide whether the ordinance was valid or not, and that the circuit court was right in refusing to enjoin the prosecution of any of the suits. In this case all the questions can be finally settled in an action of debt in the circuit court, or upon appeal from a justice's judgment. Even if the controversy would not be finally settled in one suit against each complainant, this bill could not be maintained on the ground that it is a bill of peace to put an end to unnecessary and vexatious litigation. In such a case the rights of the parties must be finally adjudicated in a court of law. In cases where one judgment is not conclusive in a subsequent suit, equity will sometimes interfere to prevent litigation which has become useless and unavailing, but the question must first be determined in at least one action at law. The court will never entertain a bill of peace so long as the right of the complainant is uncertain.

There are cases in which a court of equity will interfere to enjoin the enforcement of an ordinance for the reason that a multi-

plicity of suits will be prevented thereby, and it is argued that this is such a case. The bill is filed by two complainants, who say that they also ask relief for all others similarly situated. The facts stated, however, do not show that any other persons or corporations are similarly situated. It appears from the bill that the complainants serve practically the whole city of Chicago; that the population served by them is upwards of 2,000,000; and that, with the exception of 12 other lines operating in outlying districts and not owning downtown terminals, they are the only persons or corporations furnishing street railway transportation. It does not appear that the few other persons or corporations operating in outlying and sparsely settled districts do not furnish a sufficient number of cars, or that there is any necessity in such districts for overcrowding, or that overcrowding cars is permitted, or that any prosecution has been begun or threatened against any other person or corporation, or that any other person or corporation has suffered, or will suffer, any hardship, or make any complaint whatever of the ordinance or its provisions. The case is not at all like one where a license is required for carrying on an occupation or business, where the inference is that those engaged in the occupation or business will be required to procure the license and pay the fee therefor. The bill sets up conditions respecting these complainants and their business which could have no application to any other party, and it is clear that the controversy is between the two complainants and the defendant. There is nothing in the bill to justify the assertion that they represent a class, and the bill shows that the supposed class is not numerous.

Under the rule that equity will sometimes intervene to prevent a multiplicity of suits, it was held in City of Chicago v. Collins, 175 Ill. 445, 51 N. E. 907, 49 L. R. A. 408, 67 Am. St. Rep. 224, that 373 complainants, suing in behalf of themselves and between 200,000 and 300,000 others similarly situated, could maintain a bill to enjoin the enforcement of an ordinance requiring an annual license fee. That was a case where a license was required, and a fee exacted, from the complainants and all others who made use of means of travel in the city of Chicago. They were all similarly situated. The case of Wilkie v. City of Chicago, 188 Ill. 444, 58 N. E. 1004, 80 Am. St. Rep. 182, was a similar one. In that case 78 complainants filed a bill in behalf of themselves and 900 or more others from whom the city of Chicago exacted a license fee for pursuing their occupation. Another case where it was held that a court of equity might properly interfere was Spiegler v. City of Chicago, 216 Ill. 114, 74 N. E. 718, where complainants, on behalf of themselves and 3,000 or 4,000 other persons engaged in the same business as themselves, joined in a bill to prevent the enforcement of an ordinance licensing and regulating that business. In all of those cases there was actual application of the ordinance to numerous persons, all of whom were in like situations. In the case of German Alliance Ins.

Co. v. Van Cleave, 191 Ill. 410, 61 N. E. 94, 42 corporations, who were complainants, filed a bill to enjoin the defendant from paying over to the State Treasurer moneys collected from them as a tax. It would have required at least 42 suits to accomplish the purpose of the bill, and the facts and law in each case would have been exactly the same. It was held that the case was a proper one for the exercise of equitable powers. In the case of North American Ins. Co. v. Yates, 214 Ill. 272, 73 N. E. 423, a bill was filed by the insurance superintendent against 20 companies and 33 individuals to enjoin them from transacting the business of fire insurance without complying with the law. It was held that in such a case equity might interfere.

Plainly, there is no similarity between those cases and this case in which two complainants, operating in different parts of the city and furnishing practically all the street railway service for the city of Chicago, claim the right to maintain a suit in equity to settle the question of the validity of this ordinance for the reason that there are other persons and corporations operating lines of street railway in outlying districts, where perhaps the difficulty is not so much to prevent overcrowding cars as to fill them with passengers. So far as appears from the bill, the only real dispute is between the two complainants and the defendant, and the rights and interests of numerous parties are not involved.

The decree of the circuit court is reversed, and the bill dismissed.

Bill dismissed.[10]

DOBBINS v. CITY OF LOS ANGELES.

(Supreme Court of United States, 1904. 195 U. S. 223, 25 Sup. Ct. 18, 49 L. Ed. 169.)

In error to the Supreme Court of the state of California to review a judgment which affirmed a judgment of the superior court in and for the county of Los Angeles in that state dismissing a bill to enjoin the enforcement of a municipal ordinance prohibiting the erection or maintenance of gasworks except within certain prescribed limits. Reversed and remanded for further proceedings.

See same case below, 139 Cal. 179, 72 Pac. 970, 96 Am. St. Rep. 95.

Plaintiff in error filed a bill of complaint against the city of Los Angeles, seeking an injunction to restrain the enforcement of certain ordinances prohibiting the erection or maintenance of gasworks except within prescribed limits in said city.

[10] See McQuillin, Municipal Ordinances, § 285.

See Delaney v. Flood, 183 N. Y. 323, 76 N. E. 209, 2 L. R. A. (N. S.) 678, 111 Am. St. Rep. 759 (1906), injunction refused to restrain police authorities from stationing officers near place alleged to be kept for illegal purpose.

The case was decided upon demurrer to the bill. The complaint sets forth, in substance: That on August 26, 1901, the city council of Los Angeles adopted an ordinance making it unlawful to erect and maintain gasworks outside of a certain district described in the ordinance, and fixing penalties for the violation thereof. While this ordinance was in force the plaintiff in error made a contract with the Valley Gas & Fuel Company for the erection of certain gasworks upon territory to be thereafter designated by her, and on September 28, 1901, purchased lands within the limits of the privileged district as fixed by the ordinance. That on the 22d of November, 1901, upon application to the board of fire commissioners of the city of Los Angeles, that body granted to the plaintiff in error the privilege to erect the gasworks upon the territory aforesaid. Thereupon the plaintiff in error directed the Valley Gas & Fuel Company to proceed with the erection of the works upon the premises so purchased. That the foundations were constructed at a cost of upwards of $2,500. After the foundations had been nearly completed the city council, on November 25, 1901, passed a second ordinance, amending the first ordinance, and thereby so limiting the boundaries of the territory within which the erection of gasworks was permitted in said city as to include the premises of the plaintiff in error within the prohibited territory. The work of constructing the works was continuously prosecuted until the latter part of February, 1902, when the plaintiff in error alleges that the city of Los Angeles, combining and confederating with one James R. C. Burton and other persons unknown, caused certain employés of the company engaged in the erection of said works to be arrested, charged with the violation of the said city ordinance. Other arrests were made on the 1st and 3d of March, 1902. On the 3d of March, 1902, the city council passed a third ordinance, amending the ordinance of November 25, 1901, in respect to the description of the district within which gasworks could be erected. On March 6, 1902, the city caused the arrest of certain persons employed by the company in charge of the erection of the works, charged with the violation of the amended city ordinance.

It is averred that the adoption by the city council of the ordinances aforesaid, and the attempted enforcement thereof, were instigated by officers and agents of the Los Angeles Lighting Company, a corporation engaged in manufacturing and supplying gas in said city, and having a monopoly of said business therein. It is further averred that the action of the municipal authorities complained of was taken for the purpose of protecting the said Los Angeles Lighting Company in the enjoyment of its monopoly. It is also claimed that the territory surrounding the premises of the plaintiff in error, and within which, under the ordinance of August 26, in force when the complainant made her purchase and located and began the erection of the gasworks, it was lawful so to do, and which, by the amend-

ing ordinances, was added to the prohibited territory, was and is a district devoted almost exclusively to manufacturing enterprises. Within its boundaries there is a large amount of vacant and unoccupied land which is and will continue to be useless except for the erection of manufacturing establishments; within which were located at that time a soap factory, a wool-pulling factory, three wineries, numerous oil wells in operation, iron foundry, brass foundry, oil refinery; immediately east of said tract, railroads and an extensive tannery; immediately north, the oil tanks and refinery of the Standard Oil Company. That the works being constructed for the plaintiff in error are to be built upon concrete foundations with a superstructure of noncombustible material, so that there can be no danger from explosion, bursting, or leaking. The machinery is to be of the most approved pattern; and that there can be no leakage or escape of odors or any interference with the health, comfort, or safety of the inhabitants of the city.

The plaintiff in error relying upon the protection of the fourteenth amendment to the Constitution of the United States, prays that the permit granted by the board of fire commissioners be declared to be a valid and subsisting contract between the city of Los Angeles and herself, and that all ordinances passed by the city council in contravention thereof be declared void; that the defendant be enjoined from enforcing said ordinances against the plaintiff, from delaying or interfering with the action of the plaintiff in erecting the said works, from interfering with the maintenance and operation of the same, and for general relief.

DAY, J.[11] As this case was decided upon demurrer to the complaint, the allegations thereof must be taken as true. The question presented involves the right of the plaintiff in error to invoke the protection of the fourteenth amendment against alleged infraction of her rights by the action of the city council in passing and enforcing the ordinances which prevent the carrying on of the business of making and selling gas to the people of the city. * * *

In this case we think the allegations of the bill disclose such character of territory, such sudden and unexplained change of its limits after the plaintiff in error had purchased the property and gone forward with the erection of the works, as to bring it within that class of cases wherein the court may restrain the arbitrary and discriminatory exercise of the police power which amounts to a taking of property without due process of law and an impairment of property rights protected by the fourteenth amendment to the federal Constitution.

It is also urged by the defendants in error that a court of equity will not enjoin prosecution of a criminal case; but, as we have seen, the plaintiff in error in this case had acquired property rights which,

[11] Only a portion of the opinion is printed.

by the enforcement of the ordinances in question, would be destroyed and rendered worthless. If the allegations of the bill be taken as true, she had the right to proceed with the prosecution of the work without interference by the city authorities in the form of arrest and prosecution of those in her employ.

It is well settled that, where property rights will be destroyed, unlawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a decree of a court of equity. Davis & F. Mfg. Co. v. Los Angeles, 189 U. S. 207–218, 23 Sup. Ct. 498, 47 L. Ed. 778–780, and cases therein cited.

Upon the whole case, we are of opinion that the demurrer should have been overruled and the city of Los Angeles put upon its answer.

For the reasons herein stated, the judgment of the Supreme Court of California is reversed, and the cause remanded to that court for further proceedings not in conflict with this opinion.[12]

[12] "We cannot agree with counsel for the appellee that a court of equity has no jurisdiction to restrain the appellee [mayor and city council of Baltimore] in the enforcement of the ordinance in question, even though it may be conceded to be invalid, and that its execution would affect injuriously the rights of the appellant and others. In Page's Case, 34 Md. 558 (1871), and in Holland's Case, 11 Md. 189, 69 Am. Dec. 195 (1857), and in other cases, we have said that 'where an ordinance is void, and its provisions are about to be enforced, any party whose interests are to be injuriously affected thereby may, and properly ought to, go into a court of equity and have the execution of the ordinance stayed by injunction.'" Deems v. Baltimore, 80 Md. 164, 30 Atl. 649, 26 L. R. A. 541, 45 Am. St. Rep. 339 (1894).

An injunction will not be granted against the enactment of an ordinance. McQuillin, Municipal Ordinances, § 163; Stevens v. St. Mary's Training School, 144 Ill. 336, 32 N. E. 962, 18 L. R. A. 832, 36 Am. St. Rep. 438 (1893). See State ex rel. Rose v. Superior Court of Milwaukee County, 105 Wis. 651, 677, 678, 81 N. W. 1046, 48 L. R. A. 819 (1900).

Injunctions to restrain boards of health and other sanitary authorities have been granted: (1) Where the proposed action of the board threatened to create a nuisance. Baltimore v. Fairfield Improvement Co., 87 Md. 352, 39 Atl. 1081, 40 L. R. A. 494, 67 Am. St. Rep. 344 (1891); Upjohn v. Richland Bd. of Health, 46 Mich. 542, 9 N. W. 845, 41 Am. St. Rep. 178 (1881); Thompson v. Kimbrough, 23 Tex. Civ. App. 350, 57 S. W. 328 (1900). (2) Where the sanitary authority proposed to act beyond its jurisdiction. Hoffman v. Schultz, 31 How. Proc. (N. Y.) 385 (1866). (3) Where the summary abatement of property was threatened. Babcock v. Buffalo, 56 N. Y. 268 (1874); Rogers v. Barker, 31 Barb. (N. Y.) 447 (1860); Clark v. Syracuse, 13 Barb. (N. Y.) 32 (1852). (4) Where jurisdictional requirements have not been observed, especially that of notice and hearing. Eddy v. Bd. of Health, 10 Phila. (Pa.) 94 (1873); Weil v. Ricord, 26 N. J. Eq. 169 (1873). (5) Where they act fraudulently or oppressively. Chase v. Middleton, 123 Mich. 647, 82 N. W. 612 (1900).

On the other hand, it has been said that there is no power to inquire into the question whether there is a nuisance, and to enjoin the board of health if it should turn out that in the judgment of the court there is none. Stone v. Heath, 179 Mass. 385, 60 N. E. 975 (1901).

SECTION 46.—SAME—TO RESTRAIN THE ASSESSMENT AND COLLECTION OF TAXES

PITTSBURG, ETC., RY. v. BOARD OF PUBLIC WORKS OF WEST VIRGINIA.

(Supreme Court of United States, 1898. 172 U. S. 32, 19 Sup. Ct. 90, 43 L. Ed. 354.)

Mr. Justice GRAY delivered the opinion of the court.[13]

The collection of taxes assessed under the authority of a state is not to be restrained by writ of injunction from a court of the United States, unless it clearly appears, not only that the tax is illegal, but that the owner of the property taxed has no adequate remedy by the ordinary processes of the law, and that there are special circumstances bringing the case under some recognized head of equity jurisdiction. Dows v. Chicago, 11 Wall. 108, 20 L. Ed. 65; Hannewinkle v. Georgetown, 15 Wall. 547, 21 L. Ed. 231; State Railroad Tax Cases, 92 U. S. 575, 23 L. Ed. 663; Union Pacific Ry. v. Cheyenne, 113 U. S. 516, 5 Sup. Ct. 601, 28 L. Ed. 1098; Milwaukee v. Koeffler, 116 U. S. 219, 6 Sup. Ct. 372, 29 L. Ed. 612; Shelton v. Platt, 139 U. S. 591, 11 Sup. Ct. 646, 35 L. Ed. 273.

In Dows v. Chicago, a citizen of the state of New York, owning shares in a national bank organized and doing business in the city of Chicago, filed a bill in equity, in the Circuit Court of the United States for the Northern District of Illinois, to restrain the collection of a tax assessed by the city of Chicago upon his shares in the bank, alleging, among other things, that the tax was illegal and void, because the tax was not uniform and equal with taxes on other property, as required by the Constitution of the state, and because the shares were taxable only at the domicile of the owner, and therefore were not property within the jurisdiction of the state of Illinois. This court, speaking by Mr. Justice Field, without considering the validity of the objections to the tax, held that the bill could not be maintained, saying: "Assuming the tax to be illegal and void, we do not think any ground is presented by the bill justifying the interposition of a court of equity to enjoin its collection. The illegality of the tax and the threatened sale of the shares for its payment constitute of themselves alone no ground for such interposition. There must be some special circumstances attending a threatened injury of this kind, distinguishing it from a common trespass, and bringing the case under some recognized head of equity jurisdiction, before the preventive

[13] Only a portion of the opinion is printed.

remedy of injunction can be invoked. It is upon taxation that the several states chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of the government, and thereby cause serious detriment to the public. No court of equity will, therefore, allow its injunction to issue to restrain their action, except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law." 11 Wall. 109, 110, 20 L. Ed. 65. "The party of whom an illegal tax is collected has ordinarily ample remedy, either by action against the officer making the collection or the body to whom the tax is paid. Here such remedy existed. If the tax was illegal, the plaintiff protesting against its enforcement might have had his action, after it was paid, against the officer or the city to recover back the money, or he might have prosecuted either for his damages. No irreparable injury would have followed to him from its collection. Nor would he have been compelled to resort to a multiplicity of suits to determine his rights. His entire claim might have been embraced in a single action." 11 Wall. 112, 20 L. Ed. 65.

In the State Railroad Tax Cases, this court, in a careful and thorough opinion delivered by Mr. Justice Miller, stated that "it has been repeatedly decided that neither the mere illegality of the tax complained of, nor its injustice nor irregularity, of themselves, give the right to an injunction in a court of equity," referred to section 3224 of the Revised Statutes (U. S. Comp. St. 1901, p. 2088), which provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court," and said that, "though this was intended to apply alone to taxes levied by the United States, it shows the sense of Congress of the evils to be feared if courts of justice could, in any case, interfere with the process of collecting the taxes on which the government depends for its continued existence." The court then quoted from Dows v. Chicago and Hannewinkle v. Georgetown, above cited, and proceeded as follows: "We do not propose to lay down in these cases any absolute limitation of the powers of a court of equity in restraining the collection of illegal taxes. But we may say that, in addition to illegality, hardship or irregularity, the case must be brought within some of the recognized foundations of equitable jurisdiction, and that mere errors or excess in valuation, or hardship or injustice of the law, or any grievance which can be remedied by a suit at law, either before or after payment of taxes, will not justify a court of equity to interpose by injunction to stay collection of a tax. One of the reasons why a court should not thus interfere, as it would in any transaction between individuals, is that it has no power

to apportion the tax or to make a new assessment, or to direct another to be made by the proper officers of the state. These functions are wholly beyond the power of the court when so acting. The levy of taxes is not a judicial function. Its exercise, by the Constitutions of all the states, and by the theory of our English origin, is exclusively legislative. A court of equity is, therefore, hampered in the exercise of its jurisdiction by the necessity of enjoining the tax complained of, in whole or in part, without any power of doing complete justice by making, or causing to be made, a new assessment on any principle it may decide to be the right one.[14] In this manner, it may, by enjoining the levy, enable the complainant to escape wholly the tax for the period of time complained of, though it be obvious that he ought to pay a tax if imposed in the proper manner." 92 U. S. 613–615, 23 L. Ed. 663.

In Union Pacific Railway Co. v. Cheyenne, in which the Union Pacific Railway Company obtained an injunction against the levy of a tax by the city of Cheyenne, the facts were peculiar. The plaintiff, owning many lots of land in that city, had paid a tax assessed on all its property by a board of equalization under a general statute of the territory of Wyoming, and had also been taxed by the city of Cheyenne under provisions of its charter which had been repealed by that statute; and the bill showed, as stated in the opinion, that the levy complained of "would involve the plaintiff in a multiplicity of suits as to the title of lots laid out and being sold, would prevent their sale, and would cloud the title to all its real estate." 113 U. S. 526, 527, 5 Sup. Ct. 601, 606, 28 L. Ed. 1098. * * *[15]

[14] Compare remarks of Cooley, J., on advantages of injunction in tax proceedings, in Whitbeck v. Hudson, 50 Mich. 86, 88, 14 N. W. 708 (1883).

[15] In the case last cited (Union Pacific Railway Co. v. Cheyenne, 113 U. S. 516, 5 Sup. Ct. 601, 28 L. Ed. 1098 [1885]) the court says: "It cannot be denied that bills in equity to restrain the collection of taxes illegally imposed have frequently been sustained. But it is well settled that there ought to be some equitable ground for relief besides the mere illegality of the tax; for it must be presumed that the law furnishes a remedy for illegal taxation. It often happens, however, that the case is such that the person illegally taxed would suffer irremediable damage, or be subject to vexatious litigation, if he were compelled to resort to his legal remedy alone. For example, if the legal remedy consisted only of an action to recover back the money after it had been collected by distress and sale of the taxpayer's lands, the loss of his freehold by means of a tax sale would be a mischief hard to be remedied. Even the cloud cast upon his title by a tax under which such a sale could be made would be a grievance which would entitle him to go into a court of equity for relief. Judge Cooley fairly sums up the law on this subject as follows: 'To entitle a party to relief in equity against an illegal tax, he must by his bill bring his case under some acknowledged head of equity jurisdiction. The illegality of the tax alone, or the threat to sell property for its satisfaction, cannot, of themselves, furnish any ground for equitable interposition. In ordinary cases a party must find his remedy in the courts of law, and it is not to be supposed he will fail to find one adequate to his proper relief. Cases of fraud, accident, or mistake, cases of cloud upon the title to one's property, and cases where one is threatened with irremediable mischief may demand other remedies than those the common law can give, and these in proper case, may be afforded in courts of equity.' This statement is in gener-

SECTION 47.—MANDAMUS

BLACKSTONE'S COMMENTARIES, BOOK III, p. 110.

A Writ of Mandamus is, in general, a command issuing in the king's name from the Court of King's Bench,[16] and directed to any person, corporation, or inferior court of judicature within the king's dominions, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the Court of King's Bench has previously determined, or at least supposes, to be consonant to right and justice.

It is a high prerogative writ, of a most extensively remedial nature and may be issued in some cases where the injured party has also another more tedious method of redress, as in the case of admission or restitution to an office;[17] but it issues in all cases where the party hath a right to have any thing done, and hath no other specific means of compelling its performance. A mandamus therefore lies to compel

al accordance with the decisions of this court, as well as of many state courts. Dows v. Chicago, 11 Wall. 108, 109, 20 L. Ed. 65 (1870); Hannewinkle v. Georgetown, 15 Wall. 547, 549, 21 L. Ed. 231 (1872); State Railroad Tax Cases, 92 U. S. 575, 612, 613, 23 L. Ed. 663 (1875), and cases there cited. In Cummings v. National Bank, 101 U. S. 153, 156, 25 L. Ed. 903 (1879), where the bank filed a bill to prevent the collection of a tax wrongfully assessed by the state against the shares of its stockholders, and which the bank was required to pay, we held that the fiduciary character in which the bank stood to its stockholders entitled it to come into a court of equity for relief. In the same case the fact that a like remedy by injunction was given to parties in the state court was regarded as entitled to much weight, and it was further held that where a rule or system of valuation was adopted by the state board of assessment, calculated to operate unequally, and to violate the Constitution of the state, and applicable to a large class of individuals, or corporations, equity might properly interfere to restrain the operation of such unconstitutional exercise of power. And in Litchfield v. Webster County, 101 U. S. 773, 779, 25 L. Ed. 925 (1879), we held that a court of equity might relieve against an excessive rate of interest on taxes in arrear, which was really in the nature of a penalty, and which the state could not fairly and equitably demand, having itself claimed title to the property taxed. These authorities are sufficient to illustrate the rules by which courts of equity should be governed in assuming jurisdiction of suits brought to arrest the collection of illegal taxes. We think that the allegations of the bill in this case bring it fairly within the jurisdiction of the court. It shows that it would involve the plaintiff in a multiplicity of suits as to the title of lots laid out and being sold, would prevent their sale, and would cloud the title to all its real estate. We think that these results are sufficiently apparent, and render it unnecessary to look farther." 113 U. S. 525–527, 5 Sup. Ct. 605–606, (28 L. Ed. 1098 (1885).

"If there was no right to assess the particular thing at all, * * * an assessment under such circumstances would be void, and, of course, no pay-

[16] As to the courts which issue Mandamus, see School Inspectors of Peoria v. People, 20 Ill. 525 (1858), and note 58 L. R. A. 333.

[17] See King v. Wheeler, Lee temp. Hardwicke, 99 (1735).

the admission or restoration of the party applying to any office or franchise of a public nature, whether spiritual or temporal; to academical degrees; to the use of a meeting-house, etc. It lies for the production, inspection, or delivery of public books and papers; for the surrender of the regalia of a corporation; to oblige bodies corporate to affix their common seal; to compel the holding of a court; and for an indefinite number of other purposes, which it is impossible to recite minutely.

CODE OF PRACTICE OF GEORGIA OF 1895.

Sec. 4867. All official duties should be faithfully fulfilled, and whenever from any cause, a defect of legal justice would ensue from a failure or improper fulfillment, the writ of mandamus may issue to compel a due performance, if there be no other specific legal remedy for the legal rights.

Sec. 4868. Mandamus does not lie as a private remedy between individuals to enforce private rights, nor to a public officer who has an

ment or tender of any amount would be necessary before seeking an injunction." People's National Bank v. Marye, 191 U. S. 272, 281, 24 Sup. Ct. 68, 71, 48 L. Ed. 180 (1903).

"The assessment being bad, for the reasons which we have stated, the board of tax commissioners acted without jurisdiction, according to the decision of the Supreme Court of Indiana. Hart v. Smith, 159 Ind. 182 [64 N. E. 661, 58 L. R. A. 949, 95 Am. St. Rep. 280 (1902)]. We do not abate at all from the strictness of the rule that in general an injunction will not be granted against the collection of taxes. State Railroad Tax Cases, 92 U. S. 575, 23 L. Ed. 663 (1875). But it was recognized in the passage just quoted from People's National Bank v. Marye that under the present circumstances a resort to equity may be proper. The course adopted is the same that was taken without criticism from the court in Adams Express Co. v. Ohio State Auditor, 165 U. S. 194, 17 Sup. Ct. 305, 41 L. Ed. 683 (1897). It avoids the necessity of suits against the officers of each of the counties of the state, and we are of opinion that the bill may be maintained. Union Pacific Ry. v. Cheyenne, 113 U. S. 516, 5 Sup. Ct. 601, 28 L. Ed. 1098 (1885); Pittsburg, Cincinnati, Chicago & St. Louis Ry. v. Board of Public Works, 172 U. S. 32, 19 Sup. Ct. 90, 43 L. Ed. 354 (1898)." Fargo v. Hart, 193 U. S. 490, 503, 24 Sup. Ct. 498, 501, 48 L. Ed. 761 (1904).

In a number of states there are statutes prohibiting the granting of injunctions to restrain the assessment or collection of taxes. See Eddy v. Tp. of Lee, 73 Mich. 123, 40 N. W. 792 (1888); Laird-Norton Co. v. Pine County, 72 Minn. 409, 75 N. W. 723 (1898). But these statutes do not control the equitable jurisdiction of the federal courts. Taylor v. Louisville & N. R. Co., 88 Fed. 350, 31 C. C. A. 537 (1898).

The following additional cases in this collection are suits to restrain public officers or bodies: Lingo v. Burford, 112 Mo. 149, 20 S. W. 459 (1892); Pittsburg, C., C. & St. L. R. Co. v. Backus, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. Ed. 1031 (1894); State Railroad Tax Cases, 92 U. S. 575, 23 L. Ed. 663 (1875); Huling v. Ehrich, 183 Ill. 315, 155 N. E. 636 (1899); Metropolitan Bd. of Health v. Heister, 37 N. Y. 661 (1868); North American Cold Storage Co. v. Chicago, 211 U. S. 306, 29 Sup. Ct. 101, 53 L. Ed. 195 (1908); Eckhardt v. Buffalo, 19 App. Div. 1, 46 N. Y. Supp. 264 (1897); Lowell v. Archambault,

absolute discretion to act or not, unless there is a gross abuse of such discretion; but it is not confined to the enforcement of mere ministerial duties.

SECTION 48.—SAME—NATURE AND FORM OF PROCEEDING

STATE ex rel. ATCHISON, T. & S. F. R. CO. v. BOARD OF COM'RS OF JEFFERSON COUNTY.

(Supreme Court of Kansas, 1873. 11 Kan. 66.)

VALENTINE, J. This is an original proceeding in mandamus, brought in the name of the state of Kansas, on the relation of the Atchison, Topeka & Santa Fé Railroad Company, against the board of county commisioners of Jefferson county, to compel said county commissioners to issue certain bonds of said county to said railroad com-

189 Mass. 70, 75 N. E. 65 (1905); Chicago v. Burtice, 24 Ill. 489 (1860); Weber v. Baird, 208 Ill. 209, 70 N. E. 231 (1904); Taylor v. Louisville & N. R. Co., 88 Fed. 350, 31 C. C. A. 537 (1898); Magnetic School of Healing v. McAnnulty, 187 U. S. 94, 23 Sup. Ct. 33, 47 L. Ed. 90 (1902); Noble v. Union River Logging R. Co., 147 U. S. 165, 13 Sup. Ct. 271, 37 L Ed. 123 (1893); Bates & Guild Co. v. Payne, 194 U. S. 106, 24 Sup. Ct. 595, 48 L. Ed. 894 (1904); Reynolds v. Schultz, 27 N. Y. Sup. Ct. 282 (1867).

Taxpayers' actions to restrain the illegal, corrupt, or wasteful expenditure of public funds: Doolittle v. Supervisors of Broome County, 18 N. Y. 155 (1858), jurisdiction denied. Statute allowing such action: Laws N. Y. 1872, c. 161, now Code Civ. Proc. § 1925. See Talcott v. Buffalo, 125 N. Y. 280, 26 N. E. 263 (1891); General Municipal Law N. Y. 1892, c. 685, § 3; Rev. Laws Mass. c. 25, § 100.

Jurisdiction asserted: Colton v. Hanchett, 13 Ill. 615 (1852); New London v. Brainard, 22 Conn. 552 (1853); Crampton v. Zabriskie, 101 U. S. 601, 25 L. Ed. 1070 (1879).

Actions in equity by public authorities to restrain violation of law by private persons or corporations: Attorney General v. Gt. Northern R. Co., 1 Drew. & S. 154 (1860); Attorney General v. Railroad Companies, 35 Wis. 425 (1874); In re Debs, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092 (1895); Columbian Athletic Club v. State, 143 Ind. 98, 40 N. E. 914, 28 L. R. A. 727, 52 Am. St. Rep. 407 (1895); Com. ex rel. Pratt v. McGovern, 116 Ky. 212, 75 S. W. 261, 66 L. R. A. 280 (1903); State v. Uhrig, 14 Mo. App. 413 (1883); State v. O'Leary, 155 Ind. 526, 58 N. E. 703 (1900); Taunton v. Taylor, 116 Mass. 254, pt. 5 (1874); Village of Waupun v. Moore, 34 Wis. 450, 17 Am. Rep. 446 (1874); Mayor of Davenport Corporation v. Tozer, [1902] 2 Ch. 182; Attorney General v. Ashborne Recreation Grounds Co., [1903] 1 Ch. 101; Inhabitants of Needham v. N. Y. & N. E. R. Co., 152 Mass. 61, 25 N. E. 20 (1890); Metropolitan City Ry. Co. v. Chicago, 96 Ill. 620 (1880).

General City Law of New York, § 223: "* * * The city may maintain an action in a court of competent jurisdiction to restrain by injunction the violation of any ordinance of the common council or of the commissioner in charge of the health department, notwithstanding that an ordinance may provide a penalty for its violation."

pany. The defendants move to dismiss the action, because the affidavits, motion, and alternative writ show that the state of Kansas has no interest in the result of the action, and because it does not appear from any of the proceedings that the railroad company have any right to prosecute the action in the name of the state. It is admitted on the part of the railroad company that the state has no interest in the result of the action, and that the railroad company have no right to prosecute the action in the name of the state, or to use the name of the state as plaintiff, unless they have such right by virtue of this being a proceeding in mandamus, and by virtue of the railroad company being the relator therein.

We think the motion to dismiss the action should be sustained. The action of mandamus, as well as every other civil action, should under the statutes of Kansas, where no special provision is otherwise made, be brought and prosecuted in the name of the real party in interest. State ex rel. Wells v. Marston, 6 Kan. 524, 532. It will be conceded that this was not the rule with regard to mandamus at common law. At common law the proceeding by mandamus was in no sense an action by the relator. Neither the writ nor the return was in any case nor in any sense a pleading. No issues of fact were raised by the writ and the return. No trial could be had in the case, and no final judgment could be rendered therein between the parties—the relator and the respondent. The writ, whether alternative or peremptory, was merely a writ, and nothing more. It was purely a prerogative writ, solely within the discretion of the court (never a writ of right), and was issued in the king's name, or in the name of the sovereign authority, commanding some particular act to be done. The return was merely an answer made by the respondent to the writ, stating that he had performed the act, or giving some excuse or justification why he had not performed it. It was never a pleading, and could never be traversed or controverted by the relator, or by any one else, but was always taken as absolutely true, however false it might be in its statements of fact.[18] The only remedy that the relator had when he wished to controvert the truth of the return was to institute a separate and independent action on the case for a false return. In such an action the relator became the plaintiff, the respondent became the defendant, the proper pleadings were filed by the parties, the proper issues were made up, the proper trial was had, and the proper judgment was rendered in the action between the parties. If the judgment was for the plaintiff, he recovered his damages and costs (Tidd's Practice, 949), and the court then issued a peremptory writ of mandamus against the defendant. If the judgment was for the defendant, he recovered his costs.

[18] See Bagg's Case, 11 Coke, 93b, 99 (1615): "If * * * they certify a sufficient cause to remove him, but it is false, then the court cannot award a writ to restore him, neither can any issue be taken thereupon, because the parties are strangers, and have no day in court."

The law of mandamus as hereinbefore stated, and the subsequent action on the case for a supposed false return, was the law in England down to the passage of the statute of 9 Anne, c. 20,[19] which statute, together with the subsequent statutes passed in England regulating the proceeding by mandamus, form no part of the common law in this country. K. P. Rly. Co. v. Nichols, Kennedy & Co., 9 Kan. 252, 12 Am. Rep. 494; Comp. Laws 1862, p. 678; Gen. St. 1868, p. 1127, par. 3. For the common law of mandamus, see Bacon's Abr. "Mandamus"; Comyn's Dig. "Mandamus"; Jacob's Law Dic. "Mandamus"; Stephen's Nisi Prius, "Mandamus." But this old common-law mode or procedure for mandamus has been materially changed by statute, not only in Kansas, but in nearly every other state, and in England.

The present action of mandamus is not only the old common-law proceeding of mandamus, but it is also the old common-law action on the case for the false return. It is the two proceedings combined. The alternative writ is now not merely a writ, as formerly, but it is also a pleading. The return is not now merely a response to the writ, as formerly (which return could not formerly be traversed or denied), but it is also a pleading; and the facts therein stated may now be controverted the same as they may on any other pleading. Issues are now made up by the writ and the return. A trial may be had on such issues, and judgment rendered for the plaintiff, or for the defendant, the same as in any other civil action; and the action is now considered almost as much an action of right as any other civil action. But little now rests in the discretion of the court. Napier v. Poe, 12 Geo. 170, 178; Harrington v. Berkshire Co., 22 Pick. (Mass.) 263, 268, 33 Am. Dec. 741. In fact, the proceeding by mandamus is now under existing statutes nearly everywhere in England and America considered a a civil action by and between the real parties thereto—the relator and the respondent (Kendall v. Stokes, 3 How. 100, 11 L. Ed. 506; Arberry v. Beaver, 6 Tex. 457, 464, 55 Am. Dec. 791; State ex rel. Wells v. Marston, 6 Kan. 524, 532), who are denominated the plaintiff and the defendant. See the reports of nearly all the states.

In the most of the states the action is now entitled by making the relator the plaintiff, and the respondent the defendant, and the action is prosecuted in the name of the relator as plaintiff, and not in the name of the state, as formerly, if the reports of adjudicated cases are correct. The states of Illinois, Michigan, New York, South Carolina, Wisconsin, and possibly a few other states, constitute an exception to the general practice of the present day. Our statutes everywhere

[19] This statute applied only to mandamus proceedings for determining the rights of offices and franchises in corporations and boroughs, at that time the most common application of mandamus. It was extended to all other cases by St. 1 Wm. IV, c. 21.

seem to recognize the present proceeding by mandamus as a civil action, with the relator as the plaintiff, and the respondent as the defendant. * * *[20]

STATE ex rel. COTHREN v. LEAN.

(Supreme Court of Wisconsin, 1859. 9 Wis. 279.)

PAINE, J.[21] This was an application for a writ of mandamus, to compel Joseph Lean, the register of deeds of Iowa county, to keep his office at Mineral Point. An alternative writ was issued at the last term, and on the return day counsel appeared on behalf of Lean, and moved to quash the writ, for alleged defects in the petition on which it was granted. This motion was argued in the absence of the relator, but was not disposed of, and owing to the changes of the judges composing this court a reargument was ordered.

At the present term the relator has filed a motion to strike from the files the motion to quash, and also another motion for a peremptory writ. These three motions were argued together, and will now be disposed of.

In support of the motion to strike off, it was urged that, after an alternative writ of mandamus is once issued, the person to whom it is directed can only make return according to its mandate, and cannot be permitted to move to quash the writ, even for alleged defects in

[20] The rest of the opinion is omitted.

Accord: People ex rel. Livingston v. Pacheco, 29 Cal. 210 (1865).

See State ex rel. Green Bay & M. R. R. Co. v. Jennings, 56 Wis. 113, 119, 14 N. W. 28 (1882): "It is true that at common law the words 'civil action' would not include writs of mandamus. Commonwealth v. Commissioners of Lancaster, 6 Bin. (Pa.) 9; also Chinn v. Trustees, 32 Ohio St. 236, 237. Mr. Bouvier says: 'The vital idea of an action is a proceeding on the part of one person, as actor, against another, for the infringement of some right of the first, before a court of justice, in the manner prescribed by the court or the law.' On the other hand, a mandamus, at the common law of England, was denominated a prerogative writ, and was originally issued out of the Court of Chancery, but subsequently out of the Court of King's Bench, because the king originally sat in those courts in person, and aided in the administration of justice. Hence, in theory at least, it was not so much the individual seeking redress as the king who was the actor. In this country it cannot be a prerogative writ; but, nevertheless, partakes of the nature of such a writ, and under the Constitution and laws is issued by the courts. Attorney General v. Railroad Companies, 35 Wis. 512 et seq. Beyond question it is, however, in a proper case, in substance a civil remedy for the citizen who has been deprived of a clear legal right, notwithstanding it is commenced and prosecuted in the name of the state. The state is only a nominal party. Brower v. O'Brien, 2 Ind. 431; State v. Commissioners, 5 Ohio St. 502. The word 'suit' is frequently used in practice as synonymous with the words 'civil action,' but, nevertheless, it seems to be more comprehensive, and includes proceedings in chancery as well as law. * * * So it has been held to include proceedings by mandamus. McBane v. People, 50 Ill. 506, 507; Felts v. Mayor, 2 Head (Tenn.) 650. * * *"

See BROWN v. Crego, 29 Iowa, 321 (1870).

[21] Only a portion of the opinion of Paine, J., is printed.

substance in the petition on which it was issued. But we are satisfied that as a matter of practice, in such cases, a motion to quash is entirely proper. Alternative writs are usually granted without much examination. The papers are read, and, if it appears clearly that the petitioner is not entitled to the relief sought, the writ is refused. Otherwise it has been usual to allow it to issue, leaving the merits of the application to be determined when presented by those familiar with them, and when both sides should be represented. And this course is almost a necessity.

Applications for the writ are ex parte. The questions involved are frequently complicated, and the solutions difficult. And it would be impossible for the court to give them such examination that the issuing of the writ should be held at all conclusive on the sufficiency of the application. And a motion to quash is a proper mode of testing that sufficiency. It performs the functions of a demurrer to a declaration, and we think, if a writ should be issued on an application defective in substance, the person to whom it was directed should have some method of raising that question before being compelled to answer. And the authorities cited by the counsel for the respondent show that a motion to quash has been resorted to for that purpose, both in this country and in England. We think the practice proper, and the motion to strike off must therefore be denied.[22] * * *

The motion to quash the alternative writ is therefore denied. But as we have held the filing of such a motion to be proper practice, to test the sufficiency of the application, we think, when the motion is overruled, the respondent should have further time to answer if he desires it. If further time is desired, the respondent may answer within twenty days, and the peremptory writ is denied. If no further time to answer is desired the peremptory writ may issue.

PAINE, J. Since the former decision on the several motions then pending, the respondent has filed a return, to which the relator has demurred. On the argument the question was raised whether or not the allegations in the petition, on which the writ was issued, which are not denied by the return, are to be considered as true. The respondent's counsel contended that they were not, and that the return is the primary pleading in the case, and that on a demurrer to that nothing was to be taken as true except the allegations of the return itself.

But we do not think this view correct. On the contrary, we are satisfied, both from the reason of the thing and from the authorities on the subject, that the affidavit or petition on which the alternative writ issues, the allegations of which are incorporated into the writ itself, performs the office of a declaration. It sets forth the grounds relied on by the prosecutor, as entitling him to the peremptory writ, and it is incumbent on the respondent, by his return, to sufficiently answer those allegations, and negative the prosecutor's right. The

[22] See Cyc. "Mandamus," p. 463.

function of the return is not simply to show what would amount to a prima facie right in the respondent, in the absence of any allegation to the contrary; but it is to show a right to refuse obedience to the writ, in view of the allegations it contains. And if it does not do this, it is demurrable. And the very object of a demurrer to the return is to test its sufficiency as an answer to the allegations of the writ; and it is obvious that this can only be done by assuming all the material allegations of the writ not denied, nor confessed and avoided, to be true.

The plea or answer which the plaintiff may put in to the return is designed to enable him to traverse or confess and avoid it, when it, in the first instance, sufficiently answers the writ, and not to repeat material allegations previously made, which had been left entirely unanswered, in order to obtain the benefit of them.

We think, therefore, that the demurrer to the return raises the question of its sufficiency, and of the sufficiency of the relation, and that in disposing of it, not only the return, but every material allegation in the relation not denied nor confessed and avoided, is to be taken as true. * * *[23]

SECTION 49.—SAME—THE RETURN

PEOPLE ex rel. AMERICAN CENT. RY. v. SUPERVISOR AND TOWN CLERK OF OHIO GROVE TP., MERCER COUNTY.

(Supreme Court of Illinois, 1869. 51 Ill. 191.)

WALKER, J.[24] * * * The demurrer questions the sufficiency of the return as a defense to the prayer of the information. The alternative writ stands for a declaration, and the return as a plea. Like other pleas, it must state facts positively and distinctly. The return should set out the facts fully, so as to enable the relator to traverse them. It is not sufficient to aver conclusions of law. If facts are not stated, or if insufficiently stated, the plea will be held bad. Greater certainty is required in a return than in an ordinary plea in bar. Tapping on Mandamus, 352, 370; Moses on Mandamus, 210. In the case of People v. Kilduff, 15 Ill. 492, 60 Am. Dec. 769, it was held that every intendment would be made against returns which do not answer important facts.

[23] See Cyc. "Mandamus," p. 453.

[24] Only a portion of the opinion of Walker, J., is printed.

The return does not deny, and we must hold it to be true, that an election was held, judges and clerks appointed, and the majority of the votes cast were in favor of subscription. It does not deny that the proper requisition for an election was made, or that notices were given ten days before the election. It, however, avers that the election was not called, held and conducted according to the requirements of the act of 1859, in this: That there were no legal notices posted for the election ten days previous thereto, as required by the act, nor were judges and clerks legally appointed to hold the election. There is no effort to specify in what the notices lacked to conform to the legal requirement, or in what the appointment of such officers violated the law or failed to conform to its requirements. From what is averred in reference to these acts, the facts are not stated so that the court can determine whether they are sufficient. In this the pleader has only averred his conclusion as to the illegality of the acts thus set up and relied upon to prevent the peremptory writ from issuing. The return should have specified the particular facts which rendered the notices illegal and the acts omitted in appointing the judges and clerks. * * *[25]

SECTION 50.—SAME—INTEREST REQUIRED TO BE SHOWN

PIKE COUNTY COM'RS v. PEOPLE ex rel. METZ.

(Supreme Court of Illinois, 1849. 11 Ill. 202.)

This was a proceeding by mandamus in the Pike county circuit court, instituted by the relator against the county commissioners of that county, to compel the payment to him of the sum of $125, and interest, which had been originally appropriated by the Legislature to the county, and by a subsequent law set apart for the improvement of the navigation of McKee's creek, in said county, to be expended by the relator.

TREAT, C. J.[26] It is contended that the relator has not such an interest in the fund sought to be recovered as will authorize him to prosecute this peculiar remedy. The question, who shall be the relator, in an application for a mandamus, depends upon the object to be attained by the writ. Where the remedy is resorted to for the purpose of enforcing a private right, the person interested in having the

[25] See Commonwealth ex rel. Thomas v. Alleghany County, 37 Pa. 277 (1860).

[26] Only a portion of this case is printed.

right enforced must become the relator. He is considered as the real party, and his right to the relief demanded must clearly appear. A stranger is not permitted officiously to interfere, and sue out a mandamus in a matter of private concern. But where the object is the enforcement of a public right, the people are regarded as the real party, and the relator need not show that he is interested, as a citizen, in having the laws executed, and the right in question enforced. See the case of People v. Collins, 19 Wend. (N. Y.) 56, where this question is much discussed, and the foregoing conclusions are clearly stated. No doubt is entertained of the right of Metz to become the relator, and pursue this remedy. The object of the suit is not a matter of individual interest, but of public concern. Any citizen of the county, especially of the locality interested in having the improvement prosecuted, could become the relator, and obtain the mandamus. There is a manifest propriety in permitting Metz to give the information, and conduct the proceeding. He has the direction of the improvement, and the money, when received, is to pass into his hands, and be disbursed by him. * * *

PEOPLE ex rel. DRAKE v. REGENTS OF UNIVERSITY OF MICHIGAN.

(Supreme Court of Michigan, 1856. 4 Mich. 98.)

This was an application by the relator, who was a private citizen of this state, for an alternative mandamus against the Regents of the University of Michigan, founded upon his affidavit, which set forth that he was a citizen of this state, that there was, at the time of filing his affidavit, no Professor of Homœopathy in the Department of Medicine of the University, that the Regents, whose duty it was, had not only neglected and refused (although often requested thereto) to elect such Professor, but still neglected and refused so to do.

The law, upon which the application was founded (Sess. Laws 1856, p. 234), provides: "That the Regents shall have power to enact ordinances, by-laws, and regulations for the government of the University, to elect a President, to fix, increase and reduce the regular number of Professors and tutors, and to appoint the same, and to determine the amount of their salaries: Provided, there shall always be, at least, one Professor of Homœopathy in the Department of Medicine."

WING, J.[27] The first objection is predicated upon the alleged incapacity of an individual citizen, who is only interested in common with all other citizens of the state in the subject-matter of complaint, to institute a proceeding of this kind against a public corporation,

[27] Only a portion of the opinion is printed.

sustaining the relations which the University of Michigan does to this state.

It is alleged that, where there is a cause of complaint against a public body or corporation, it is the duty of the Attorney General of the state to move against them, and that it would be peculiarly fit, in a matter of complaint of so grave a character as that presented by the affidavit of the relator, that it should be presented by, or be under the control and sanction of, that officer, whose duty it is to act in all such cases. To this it is answered by the counsel of the relator, in substance, that though true it is the matter in question is one that interests the citizens generally, yet the right of every citizen of the state to move in the proper courts in a matter in which the citizens at large are concerned, and in respect to which there is ground of complaint against a public body or officers of this state that they have neglected the performance of some duty imposed upon them by law, is fully sustained both by principle and authority.

Upon examination of the authorities cited by the counsel of the respective parties, we find no case decided by the English courts which sanctions this action of their courts on an application of this character, upon the sole motion of a private citizen of the realm. From this it is, we think, to be inferred that the practice was never sanctioned by their courts.

On looking into the American authorities cited, we find that the Supreme Court of New York have taken the broad ground in the case of People v. Collins, 19 Wend. 64, and in People v. Tracy, 1 Denio, 618, that in all cases requiring redress, and involving a matter in which the interests of the public at large are concerned, and in respect to which a mandamus is the proper remedy, it is competent for their courts to act upon the relation and motion of a private citizen of the state. The doctrine of those cases was approved and followed by the Supreme Court of Illinois in the case of County of Pike v. State, 11 Ill. 202. These are the only cases to which we have been cited, or which have fallen under our observation, which sanction the right claimed by the relator in this case.

To these authorities, as we have said, is opposed the fact that the English courts, which have moulded and formed the common law, transmitted it to us, and which govern both them and us, have not sustained a course of proceeding like this. The courts of Maine, Massachusetts and Pennsylvania have maintained a doctrine on this subject opposed to the New York and Illinois cases, and have held that, to entitle an individual citizen to be heard as a relator and on his own motion, he must show that he has some individual interest in the subject-matter of complaint which is not common to all the citizens of the state; and whilst we do not intend to say that a case may not arise in which this court would allow an individual to file such a complaint, particularly if the Attorney General or prosecuting attorney (as the case may be) were absent, or refused to act

without good cause, we nevertheless express our conviction that this is a case in which the action of the Attorney General would have been proper and necessary. * * *[28]

SECTION 51.—MANDAMUS AGAINST BOARD OR PUBLIC CORPORATION

COMMISSIONERS v. SELLEW.

(Supreme Court of the United States, 1878. 99 U. S. 624, 25 L. Ed. 333.)

WAITE, C. J.[29] * * * In United States v. Boutwell, 17 Wall. 604, 21 L. Ed. 721, it was decided that, as a mandamus was used "to compel the performance of a duty resting upon the person to whom the writ is sent," if directed to a public officer, it abated on his death or his retirement from office, because it could not reach the office. That principle does not, as we think, apply to this case. There the officer proceeded against was the Secretary of the Treasury of the United States, and the writ was "aimed exclusively against him as a person." Here the writ is sent against the board of county commissioners, a corporation created and organized for the express purpose of performing the duty, among others, which the relator seeks to have enforced. The alternative writ was directed both to the board in its corporate capacity and to the individual members by name, but the peremptory writ was ordered against the corporation alone. As the corporation can only act through its agents, the courts will operate upon the agents through the corporation. When a copy of the writ which has been ordered is served upon the clerk of the board, it will be served on the corporation, and be equivalent to a command that the persons who may be members of the board shall do what is required. If the members fail to obey, those guilty of disobedience may, if necessary, be punished for the contempt. Although the command is in form to the board, it may be enforced against those through whom alone it can be obeyed. One of the objects in creating such corporations, capable of suing and being sued, and having perpetual succession, is that the very inconvenience which manifested itself in Boutwell's Case may be avoided. In this way the office can be reached and the officer compelled to perform its duties, no matter what changes are made in the agents by whom the officer acts. The board is in effect the officer, and the members of

[28] See an article by Prof. F. J. Goodnow on "Interest in Mandamus Cases," Political Science Quarterly, VIII, p. 48.

[29] Only a portion of the opinion of Waite, C. J., is printed.

the board are but the agents who perform its duties. While the board is proceeded against in its corporate capacity, the individual members are punished in their natural capacities for failure to do what the law requires of them as the representatives of the corporation.

We think, therefore, that the peremptory writ was properly directed to the board in its corporate capacity. In this way the power of the writ is retained until the thing is done which is commanded, and it may at all times be enforced, through those who are for the time being charged with the obligation of acting for the corporation. If in the course of the proceedings it appears that a part of the members have done all they could to obey the writ, the court will take care that only those who are actually guilty of disobedience are made to suffer for the wrong that is done. Those who are members of the board at the time when the board is required to act will be the parties to whom the court will look for the performance of what is demanded. As the corporation cannot die or retire from the office it holds, the writ cannot abate as it did in Boutwell's Case. The decisions in the state courts in which this practice is sustained are numerous. Maddox v. Graham, 2 Metc. (Ky.) 56; State ex rel. Soutter v. City of Madison, 15 Wis. 30; Pegram v. Commissioners of Cleaveland County, 65 N. C. 114; People v. Collins, 19 Wend. (N. Y.) 56. * * *[30]

SECTION 52.—REFUSAL TO OBEY MANDAMUS

AMY v. SUPERVISORS.

(Supreme Court of the United States, 1870. 11 Wall. 136, 20 L. Ed. 101.)

Amy having obtained a judgment for money against Des Moines County, Iowa, in the Circuit Court for the District of Iowa, and not being paid, procured from the same court a mandamus against Burkholder and several others, the supervisors of the county, to compel the levy of a tax. The mandamus not being obeyed, he sued them personally. They set up certain defenses, to which he demurred. The court overruled the demurrer, and he brought the case here.

SWAYNE, J.[31] * * * The rule is well settled that where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct. There is an unbroken current of authorities to this effect. A mistake

[30] See, also, City of Ottawa v. People, 48 Ill. 233 (1868).

[31] Only a portion of the opinion of Swayne, J., is printed.

as to his duty and honest intentions will not excuse the offender. The question of the rule by which the measure of damages is to be ascertained is not before us, and we do not feel called upon to express any opinion upon the subject.

The defenses set up in the answer of the defendants are clearly bad. The demurrer should have been sustained. * * *[32]

SECTION 53.—PROVINCE OF THE WRIT OF MANDAMUS

HASSEL'S CASE.

(Court of King's Bench, 1719. 1 Str. 211.)

Fazakerley moved for a mandamus to be directed to the justices of peace of the county of Chester, commanding them to make a rate to reimburse one Hassel the money he had expended as surveyor of the highways. And it was granted.

JOHN GILES' CASE.

(Court of King's Bench, 1731. 2 Str. 881.)

Mr. Reeve moved for a mandamus to the justices of the city of Worcester, to grant a license to Giles to keep an alehouse, insisting that, it being within a city, St. Geo. II, c. 28, did not extend to it.

Strange, contra, insisted that it was discretionary in the justices, and cited Stephens v. Watson, 1 Salk. 45, that no appeal lies from the denial of a license,[33] and if the owner be committed, the want of a license can only come in question, and not the reason why it was denied.

Et PER CURIAM. There never was an instance of such a mandamus, and therefore we will not grant it.

[32] Disobedience to the writ of mandamus constitutes contempt of court, and is punishable by fine and imprisonment. Cyc. "Mandamus," p. 499.

[33] "It was said by Mr. Nares in the case of Rex. v. Young and Pitts, Esq., B. R. 20th April, 1758, that the sole reason why the justices of the peace refused the license in this case was because Giles had signed a petition to erect a workhouse, and though the refusal was so ill founded, yet the mandamus was denied. MSS. See, also, the report of that case. 1 Burr, 556. (Note by Reporter.)

KING v. BISHOP OF LITCHFIELD.

(Court of King's Bench, 1734. 7 Mod. 217.)

Mandamus to Bishop to license a person elected usher to a grammar school.

Lord HARDWICKE, Chief Justice.[34] * * * If the bishop here acts judicially, a mandamus lies not to compel him to grant a license, but only to determine the one way or the other; as we often grant them to give sentence, generally, without directing them what sentence to give, so to give judgment in inferior courts; but if he acts ministerially, and it appears to us that the person applying for a mandamus is qualified for the office he prays to be admitted to, then a mandamus goes requiring his admission. I should doubt whether he acts in a judicial capacity in this place. * * *[35]

KENDALL v. UNITED STATES ex rel. STOKES.

(Supreme Court of United States, 1838. 12 Pet. 524, 9 L. Ed. 1181.)

Error to the Circuit Court of the District of Columbia.

The Circuit Court had ordered a peremptory mandamus, to be directed against the Postmaster General, to be issued. The Postmaster General prosecuted this writ of error.

THOMPSON, Justice, delivered the opinion of the court.[36]

This case comes up on a writ of error from the Circuit Court of the United States for the District of Columbia, sitting for the county of Washington. This case was brought before the court below by petition setting out certain contracts made between the relators and the late Postmaster General, upon which they claimed certain credits and allowances upon their contracts for the transportation of the mail; that credits and allowances were duly made by the late Postmaster General; that the present Postmaster General, when he came into office, re-examined the contracts entered into with his predecessor, and the allowances made by him, and the credits and payments which had been made, and directed that the allowances and credits should be withdrawn, and the relators recharged with divers payments they had received; that the relators presented a memorial to Congress on the subject, upon which a law was passed on the 21st of July, 1836, for their relief, by which the Solicitor of the Treasury was authorized and directed to settle and adjust the claims of the relators for extra services performed by them, to inquire into and determine the equity

[34] Only a portion of the opinion by Lord Hardwicke is printed.

[35] See Rex v. Askew, 4 Burr. 2189 (1768); Rex v. Archbishop of Canterbury, 15 East, 142 (1812).

[36] Only a portion of this case is here printed.

of such claims, and to make the relators such allowances therefor as, upon full examination of all the evidence, may seem right, according to the principles of equity; and that the Postmaster General be and he is hereby directed to credit the relators with whatever sum or sums of money, if any, the Solicitor shall so decide to be due to them, for and on account of any such service or contract. And the petition further sets out that the Solicitor, Virgil Maxey, assumed upon himself the performance of the duty and authority created and conferred upon him by the law, and did make out and communicate his decision and award to the Postmaster General, by which award and decision the relators were allowed $161,563.89; that the Postmaster General, on being notified of the award, only so far obeyed and carried into execution the act of Congress as to direct, and cause to be carried to the credit of the relators, the sum of $122,102.46; but that he has and still does refuse and neglect to credit the relators with the residue of the sum so awarded by the solicitor, amounting to $39,462.43. And the petition prayed the court, to award a mandamus, directed to the Postmaster General, commanding him fully to comply with, obey and execute the said act of Congress, by crediting the relators with the full and entire sum awarded in their favor by the Solicitor of the Treasury. Such proceedings were afterwards had in the case that a peremptory mandamus was ordered, commanding the said Amos Kendall, Postmaster General, forthwith to credit the relators with the full amount awarded and decided by the Solicitor of the Treasury to be due to the relators.

The questions arising upon this case may be considered under two general inquiries: (1) Does the record present a proper case for a mandamus? And if so, then (2) had the Circuit Court of this District jurisdiction of the case, and authority to issue the writ?

Under the first head of inquiry, it has been considered by the counsel on the part of the Postmaster General that this is a proceeding against him to enforce the performance of an official duty. And the proceeding has been treated as an infringement upon the executive department of the government, which has led to a very extended range of argument on the independence and duties of that department, but which, according to the view taken by the court of the case, is entirely misapplied. We do not think the proceedings in this case interfere, in any respect whatever, with the rights or duties of the executive; or that it involves any conflict of powers between the executive and judicial departments of the government. The mandamus does not seek to direct or control the Postmaster General in the discharge of any official duty, partaking in any respect of an executive character, but to enforce the performance of a mere ministerial act, which neither he nor the President had any authority to deny or control.

We shall not, therefore, enter into any particular examination of the line to be drawn between the powers of the executive and judi-

cial departments of the government. The theory of the Constitution undoubtedly is that the great powers of the government are divided into separate departments; and so far as these powers are derived from the Constitution, the departments may be regarded as independent of each other. But, beyond that, all are subject to regulations by law touching the discharge of the duties required to be performed.

The executive power is vested in a President; and so far as his powers are derived from the Constitution, he is beyond the reach of any other department, except in the mode prescribed by the Constitution through the impeaching power. But it by no means follows that every officer in every branch of that department is under the exclusive direction of the President. Such a principle, we apprehend, is not and certainly cannot be claimed by the President. There are certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the President. But it would be an alarming doctrine that Congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the Constitution; and in such cases the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President. And this is emphatically the case, where the duty enjoined is of a mere ministerial character. * * *

Under this law, the Postmaster General is vested with no discretion or control over the decisions of the Solicitor; nor is any appeal or review of that decision provided for by the act. The terms of the submission was a matter resting entirely in the discretion of Congress; and if they thought proper to vest such a power in any one, and especially as the arbitrator was an officer of the government, it did not rest with the Postmaster General to control Congress, or the Solicitor, in that affair. * * *

It was urged at the bar that the Postmaster General was alone subject to the direction and control of the President, with respect to the execution of the duty imposed upon him by this law; and this right of the President is claimed as growing out of the obligation imposed upon him by the Constitution to take care that the laws be faithfully executed. This is a doctrine that cannot receive the sanction of this court. It would be vesting in the President a dispensing power, which has no countenance for its support in any part of the Constitution, and is asserting a principle which, if carried out in its results to all cases falling within it, would be clothing the President with a power entirely to control the legislation of Congress, and paralyze the administration of justice.[37]

To contend that the obligation imposed on the President to see the laws faithfully executed implies a power to forbid their execution

[37] See Bayard v. United States ex rel. White, 127 U. S. 246, 8 Sup. Ct. 1223, 32 L. Ed. 116 (1888), last paragraph.

is a novel construction of the Constitution, and entirely inadmissible. But although the argument necessarily leads to such a result, we do not perceive from the case that any such power has been claimed by the President. But, on the contrary, it is fairly to be inferred that such power was disclaimed. He did not forbid or advise the Postmaster General to abstain from executing the law, and giving the credit thereby required, but submitted the matter in a message to Congress. * * *

The right of the relators to the benefit of the award ought now to be considered as irreversibly established; and the question is, whether they have any, and what, remedy? The act required by the law to be done by the Postmaster General is simply to credit the relators with the full amount of the award of the Solicitor. This is a precise, definite act, purely ministerial, and about which the Postmaster General had no discretion whatever. The law, upon its face, shows the existence of accounts between the relators and the Post Office Department. No money was required to be paid, and none could have been drawn out of the treasury, without further legislative provision, if this credit should overbalance the debit standing against the relators. But this was a matter with which the Postmaster General had no concern. He was not called upon to furnish the means of paying such balance, if any should be found; he was simply required to give the credit. This was not an official act in any other sense than being a transaction in the department where the books and accounts were kept, and was an official act in the same sense that an entry in the minutes of a court, pursuant to an order of the court, is an official act. There is no room for the exercise of any discretion, official or otherwise. All that is shut out by the direct and positive command of the law, and the act required to be done is, in every just sense, a mere ministerial act.

And in this view of the case, the question arises, is the remedy by mandamus the fit and appropriate remedy? The common law, as it was in force in Maryland, when the cession was made, remained in force in this District. We must, therefore, consider this writ as it was understood at the common law, with respect to its object and purpose, and varying only in the form required by the different character of our government. It is a writ, in England, issuing out of the King's Bench, in the name of the king, and is called a prerogative writ, but considered a writ of right;[38] and is directed to some person, corporation or inferior court, requiring them to do some particular thing, therein specified, which appertains to their office or duty, and which is supposed to be consonant to right and justice, and where there is no other adequate specific remedy. Such a writ, and for such a purpose, would seem to be peculiarly appropriate to the

[38] See People ex rel. etc., v. Common Council, etc., 78 N. Y. 56, 61 (1879), post, p. 500.

present case. The right claimed is just and established by positive law; and the duty required to be performed is clear and specific, and there is no other adequate remedy.

The remedies suggested at the bar were, then, an application to Congress, removal of the Postmaster General from office, and an action against him for damages. The first has been tried and failed. The second might not afford any certain relief, for his successors might withhold the credit in the same manner; and, besides, such extraordinary measures are not the remedies spoken of in the law which will supersede the right of resorting to a mandamus; and it is seldom that a private action at law will afford an adequate remedy. If the denial of the right be considered as a continuing injury, to be redressed by a series of successive actions, as long as the right is denied, it would avail nothing, and never furnish a complete remedy. Or, if the whole amount of the award claimed should be considered the measure of damages, it might, and generally would, be an inadequate remedy, where the damages were large. The language of this court, in the case of Osborn v. United States Bank, 9 Wheat. 844, 6 L. Ed. 204, is that the remedy by action in such cases would have nothing real in it. It would be a remedy in name only, and not in substance, especially where the amount of damages is beyond the capacity of a party to pay.

That the proceeding on a mandamus is a case within the meaning of the act of Congress has been too often recognized in this court to require any particular notice. It is an action or suit brought in a court of justice, asserting a right, and is prosecuted according to the forms of judicial proceedings.[39]

DECATUR v. PAULDING.

(Supreme Court of the United States, 1840. 14 Pet. 497, 10 L. Ed. 559.)

TANEY, C. J., delivered the opinion of the court.

This case is brought here by a writ of error from the judgment of the Circuit Court of the United States for the District of Columbia, refusing to award a peremptory mandamus. The material facts in the case are as follows:

By an act of Congress, passed on the 3d of March, 1837, the widow of an officer who died in the naval service became entitled to receive out of the navy pension fund half the monthly pay to which the deceased officer would have been entitled under the acts reg-

[39] For latter part of opinion, see post, p. 454.

Stokes subsequently brought an action for damages against Kendall, but it was held that the refusal to credit the amount in question did not constitute an actionable wrong; also that the plaintiff could not resort both to mandamus and to an action for damages. Kendall v. Stokes, 3 How. 87, 11 L. Ed. 506 (1845).

ulating the pay of the navy in force on the 1st day of January, 1835; the half pay to commence from the time of the death of such officer, and upon the death or intermarriage of such widow, to go to the child or children of the officer. On the same day, the following resolution was passed by Congress:

"No. 2. Resolution granting a pension to Susan Decatur, widow of the late Stephen Decatur.

"Resolved, by the Senate and House of Representatives of the United States of America in Congress assembled, that Mrs. Susan Decatur, widow of the late Commodore Stephen Decatur, be paid from the navy pension fund a pension, for five years, commencing from the 30th day of June, 1834, in conformity with the provisions of the act concerning naval pensions and the navy pension fund, passed the 30th of June, 1834, and that she be allowed, from said fund, the arrearages of the half pay of a post captain, from the death of Commodore Decatur, to the 30th of June, 1834, together with the pension hereby allowed her, and that the arrearage of said pension be vested in the Secretary of the Treasury, in trust for the use of the said Susan Decatur: Provided that the said pension shall cease on the death or marriage of the said Susan Decatur.

"Approved, March 3, 1837."

By the act of Congress of July 10, 1832, the Secretary of the Navy is constituted the trustee of the navy pension fund, and as such it is made his duty to grant and pay the pensions, according to the terms of the acts of Congress.

After the passage of the law and resolution of March 3, 1837, Mrs. Susan Decatur, the widow of Commodore Decatur, applied to Mahlon Dickerson, then Secretary of the Navy, to be allowed the half pay to which she was entitled under the general law above mentioned, and also the pension and arrearages of half pay specially provided for her by the resolution passed on the same day. The Secretary of the Navy, it appears, doubted whether she was entitled to both, and referred the matter to the Attorney General, who gave it as his opinion that Mrs. Decatur was not entitled to both, but that she might take under either, at her election. The Secretary thereupon informed her of the opinion of the Attorney General, offering at the same time to pay her under the law, or the resolution, as she might prefer. Mrs. Decatur elected to receive under the law; but it is admitted by the counsel on both sides that she did not acquiesce in this decision, but protested against it, and by consenting to receive the amount paid her she did not mean to waive any right she might have to the residue.

Some time afterwards Mr. Dickerson retired from the office of Secretary of the Navy, and was succeeded by Mr. Paulding, the defendant in this writ of error; and in the fall of 1838 Mrs. Decatur applied to him to revise the decision of his predecessor, and to allow her the pension provided by the resolution. The Secretary declined

doing so, whereupon Mrs. Decatur applied to the circuit court for Washington county, in the District of Columbia, for a mandamus to compel him to pay the amount she supposed to be due to her. A rule to show cause was granted by the court; and upon a return made by him, stating, among other things, the facts above mentioned, the court refused the application for a peremptory mandamus. It is this decision we are now called on to revise.

In the case of Kendall v. United States, 12 Pet. 524, 9 L. Ed. 1181, it was decided in this court that the circuit court for Washington county, in the District of Columbia, has the power to issue a mandamus to an officer of the federal government, commanding him to do a ministerial act. The first question, therefore, to be considered in this case, is whether the duty imposed upon the Secretary of the Navy, by the resolution in favor of Mrs. Decatur, was a mere ministerial act. The duty required by the resolution was to be performed by him, as the head of one of the executive departments of the government, in the ordinary discharge of his official duties. In general, such duties, whether imposed by act of Congress or by resolution, are not mere ministerial duties. The head of an executive department of the government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolutions of Congress, under which he is, from time to time, required to act. If he doubts, he has a right to call on the Attorney General to assist him with his counsel; and it would be difficult to imagine why a legal adviser was provided by law for the heads of departments, as well as for the President, unless their duties were regarded as executive, in which judgment and discretion was to be exercised.

If a suit should come before this court, which involved the construction of any of these laws, the court certainly would not be bound to adopt the construction given by the head of a department. And if they supposed his decision to be wrong, they would, of course, so pronounce their judgment. But their judgment upon the construction of a law must be given in a case in which they have jurisdiction, and in which it is their duty to interpret the act of Congress, in order to ascertain the rights of the parties in the cause before them. The court could not entertain an appeal from the decision of one of the Secretaries nor revise his judgment in any case, where the law authorized him to exercise discretion or judgment. Nor can it, by mandamus, act directly upon the officer, and guide and control his judgment or discretion in the matters committed to his care, in the ordinary discharge of his official duties.

The case before us illustrates these principles, and shows the difference between executive duties and ministerial acts. The claim of Mrs. Decatur having been acted upon by his predecessor in office, the Secretary was obliged to determine whether it was proper to re-

vise that decision. If he had determined to revise it, he must have exercised his judgment upon the construction of the law and the resolution, and have made up his mind whether she was entitled under one only, or under both. And if he determined that she was entitled under the resolution as well as the law, he must then have again exercised his judgment, in deciding whether the half pay allowed her was to be calculated by the pay proper, or the pay and emoluments of an officer of the commodore's rank. And after all this was done, he must have inquired into the condition of the navy pension fund, and the claims upon it, in order to ascertain whether there was money enough to pay all the demands upon it, and if not money enough, how it was to be apportioned among the parties entitled. A resolution of Congress, requiring the exercise of so much judgment and investigation, can, with no propriety, be said to command a mere minsterial act to be done by the Secretary.

The interference of the courts with the performance of the ordinary duties of the executive departments of the government would be productive of nothing but mischief, and we are quite satisfied that such a power was never intended to be given to them. Upon the very subject before us, the interposition of the courts might throw the pension fund and the whole subject of pensions into the greatest confusion and disorder. It is understood, from the Secretary's return to the mandamus, that in allowing the half pay it has always been calculated by the pay proper, and that the rations or emoluments to which the officer was entitled have never been brought into the calculation. Suppose the court had deemed the act required by the resolution in question a fit subject for a mandamus, and, in expounding it, had determined that the rations and emoluments of the officer were to be considered in calculating the half pay. We can readily imagine the confusion and disorder into which such a decision would throw the whole subject of pensions and half pay, which now forms so large a portion of the annual expenditure of the government, and is distributed among such a multitude of individuals.

The doctrines which this court now hold in relation to the executive department of the government are the same that were distinctly announced in the case of Kendall v. United States, 12 Pet. 524, 9 L. Ed. 1181. In opinion the court say [12 Pet. 610]: "We do not think the proceeding in this case interferes, in any respect whatever, with the rights or duties of the executive, or that it involves any conflict of powers between the executive and judicial departments of the government. The mandamus does not seek to direct or control the Postmaster General in the discharge of any official duty, partaking in any respect of an executive character, but to enforce the performance of a mere ministerial act, which neither he nor the President had any authority to deny or control." And [12 Pet. 614] the court still more strongly state the mere ministerial character of the act required to be done in that case, and distinguish it from official

acts of the head of a department, where judgment and discretion are to be exercised. The court there say: "He was simply required to give the credit. This was not an official act in any other sense than being a transaction in the department where the books and accounts were kept, and was an official act in the same sense that an entry in the minutes of a court, pursuant to an order of the court, is an official act. There is no room for the exercise of any discretion, official or otherwise. All that is shut out by the direct or positive command of the law, and the act required to be done is, in every just sense, a mere ministerial act."

We have referred to these passages in the opinion given by the court in the case of Kendall v. United States, in order to show more clearly the distinction taken between a mere ministerial act, required to be done by the head of an executive department, and a duty imposed upon him in his official character as the head of such department, in which judgment and discretion are to be exercised. There was in that case a difference of opinion in the court in relation to the power of the circuit court to issue the mandamus. But there was no difference of opinion respecting the act to be done. The court were unanimously of opinion that in its character the act was merely ministerial. In the case before us it is clearly otherwise. The resolution in favor of Mrs. Decatur imposed a duty on the Secretary of the Navy, which required the exercise of judgment and discretion; and in such a case, the circuit court had no right, by mandamus, to control his judgment, and guide him in the exercise of a discretion which the law had confided to him.

We are, therefore, of opinion that the circuit court were not authorized by law to issue the mandamus, and committed no error in refusing it. And as we have no jurisdiction over the acts of the Secretary in this respect, we forbear to express any opinion upon the construction of the resolution in question. The judgment of the circuit court, refusing to award a peremptory mandamus, must be affirmed.[40]

[40] "The construction of a statute is not a ministerial act; it is the exercise of judgment. If it is the duty of the defendant to admit or not to admit the plaintiff to do business in this state, according to the interpretation to be put on the insurance statutes, then the admitting or refusing to admit involves the exercise of discretion and judgment. * * * It is not a purely ministerial act and a mandamus ought not to issue." American Casualty Ins. Co. v. Fyler, 60 Conn. 448, 462, 22 Atl. 494, 25 Am. St. Rep. 337 (1891).

"Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer. Unless this be so, the value of this writ [i. e., the writ of mandamus] is very greatly impaired. Every executive of-

PEOPLE ex rel. BAILEY v. BOARD OF SUPERVISORS OF GREENE COUNTY.

(Supreme Court of New York, 1851. 12 Barb. 217.)

HARRIS, J.[41] * * * The board of canvassers illegally and unjustly omitted to count the votes of the Third election district of the town of Catskill. The relator had a legal right to have these votes counted. The board, therefore, omitted to do an act which they ought to have done. There has been an omission to perform an official duty. For this omission the relator ought to have a remedy; and if no other remedy exists, and the parties to whom the writ is directed can yet perform the duty, he is entitled to a mandamus. If, on the other hand, the defendants cannot now perform that duty, even though they have erred in omitting to count the votes in question, the relator must look for some other remedy. A mandamus, if granted, would be unavailing.

The county board of canvassers, except in certain specific cases, is composed of the supervisors of the several towns in the county. The

ficer whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the court he might successfully plead that the performance of the duty involved the construction of a statute by him, and therefore it was not ministerial, and the court would on that account be powerless to give relief. Such a limitation of the powers of the court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties, whenever they should plead that the duty required of them arose upon the construction of a statute, no matter how plain its language, nor how plainly they violated their duty in refusing to perform the act required." Roberts, Treasurer, v. United States, 176 U. S. 221, 231, 20 Sup. Ct. 376, 379, 44 L. Ed. 443 (1899).

In New York, where the scope of the writ of certiorari is very extensive, mandamus apparently does not lie to correct errors in the judicial determination by administrative authorities of questions of fact or questions of law. People ex rel. Harris v. Commissioners of Land Office, 149 N. Y. 26, 43 N. E. 418 (1896); People ex rel. Sims v. Collier, 175 N. Y. 196, 67 N. E. 309 (1903).

See, further, Allbutt v. General Council, 23 Q. B. D. 90 (1889), post, p. 542; United States ex rel. Dunlap v. Black, 128 U. S. 40, 9 Sup. Ct. 12, 32 L. Ed. 354 (1888), post, p. 648; United States ex rel. Riverside Oil Co. v. Hitchcock, 190 U. S. 316, 23 Sup. Ct. 698, 47 L. Ed. 1074 (1903), post, p. 646.

That mandamus will not lie to control the exercise of discretion, especially in the matter of liquor licenses, see Batters v. Dunning, 49 Conn. 479 (1882); Ex parte Yeager, 11 Grat. (Va.) 655 (1854); Post v. Township Board of Sparta, 64 Mich. 597, 31 N. W. 535 (1887); Attorney General v. Guilford County Justices, 27 N. C. 315 (1844); Jones v. Commissioners of Moore Co., 106 N. C. 436, 11 S. E. 514 (1890); Commissioners of Maxton v. Commissioners of Robeson County, 107 N. C. 335, 12 S. E. 92 (1890); Harrison v. People, 222 Ill. 150, 78 N. E. 52 (1906); People ex rel. Schwab v. Grant, 126 N. Y. 473, 27 N. E. 964 (1891); Armstrong v. Murphy, 65 App. Div. 123, 72 N. Y. Supp. 473 (1901); A. H. Fenn, Two Questions Concerning Mandamus, 2 Yale Law Journal, 219.

See, however, Illinois State Board of Dental Examiners v. People, 123 Ill. 227, 13 N. E. 207 (1887).

[41] Only a portion of the opinion of Harris, J., is printed.

alternative mandamus assumes that the defendants, being such supervisors, constitute the board. This is not necessarily the case; but I will consider the question upon the assumption that this is so. That board met on the Tuesday following the election, and organized according to law. It then proceeded, though illegally and improperly, as it is alleged, to estimate the votes of the county and to make the statements prescribed by statute. They also proceeded to determine who had been elected county officers. This determination, it may be assumed, was erroneous. But it was made, and a copy, with the statement upon which it was made, has been published. It has been filed, and has become matter of record. The board has dissolved. Were the same individuals again to convene, they would not again constitute the county board of canvassers. No statute authorizes such second assembling, or prescribes its mode of organization. If convened and organized, it would have no legal authority to review its former acts, or correct its errors. When the board deposited with the clerk the result of its canvass, and declared who were elected to office, and published that result and determination, all its powers were expended. If it had erred, the errors must be corrected by some other tribunal. The law has withheld from it the power of reviewing its own determinations.

But suppose the supervisors to reassemble and assume the office of recanvassing the votes of the county. They have already determined that Lyman Tremain is elected to the office of county judge. If they should obey the mandamus, they might make a new statement and determination, showing that the relator is elected. The object of granting the writ of mandamus is, as we have seen, to provide an efficacious remedy to the relator, so as to prevent a failure of justice. Of what advantage would such a determination, made under such circumstances, be to the relator? The result would, undoubtedly, be, as now, that both parties would claim to have been elected county judge. Both would take the requisite oath of office, and assume its duties, and the controversy then, as now, would only be determined by an action in the nature of a quo warranto. Such a revision of the canvass, therefore, if practicable, would produce no beneficial result, even to the relator himself. Instead of being an efficacious remedy, the writ in its operation would be wholly abortive. When it can be foreseen that this must be the result, the writ should not be granted. Lex non cogit ad inutilia. "The court will refuse the writ," says Tapping, "if it be manifest that it must be vain and fruitless, or cannot have a beneficial effect." Tapping on Mandamus, 17. I am of opinion, therefore, that, assuming that the board of canvassers erred in rejecting the votes of the Third election district of the town of Catskill, it is now too late for the canvassers to correct that error. The matter has passed beyond their jurisdiction or control. If the defendants, moved by the command of this court, or otherwise, should undertake such correction, their action would be wholly ineffectual

for the purposes for which the relator seeks to enforce it. Nothing short of a quo warranto action can determine his right to the office.

I will not say that a state of facts might not occur which would call upon the court to interfere by mandamus to control the action of a board of canvassers, but this can only be done while such board is in existence. And even then the nature of the duties to be discharged by it is such that it can rarely be either expedient or practicable thus to interfere.[42] But, when the board, having performed the office for which it was constituted, whether legally or not, has been dissolved, it is incapable of being reanimated. Any act it should attempt to perform, even though it be done in obedience to the mandate of this court, would be extraofficial and nugatory.

Nor does the relator need this writ. He has another and a more efficacious remedy. I agree with him that it is not an answer to the application for a mandamus to show that some other remedy exists against some other party. It would not, of itself, be enough for the defendants to show that the relator can obtain relief by quo warranto against the person whom they have declared to be elected. This principle only prevails when such other remedy is attainable against the same party to whom it is sought to have the mandamus directed. I prefer to put the refusal to grant the writ upon the ground that it is inappropriate and ineffectual, and that, by withholding it, we do not leave the relator without an appropriate and effectual remedy.

The ancient and appropriate proceeding to try and determine the right and title to all offices, says a very learned judge, was under the writ of quo warranto; and where a legal question was involved, this was the only mode of determining it. By the Revised Statutes, this old remedy is not only preserved, but rendered more expeditious and manageable, and it is declared to be especially applicable "when any person shall usurp, intrude into, or unlawfully hold or exercise any public office." 2 Rev. St. 581, § 28. See, also, Code 1851, § 432. "Provision is made for the determination of issues of law and of fact. The right of trial by jury, so vital to the due decision of the latter, is expressly maintained and declared. This, then, is emphatically the constitutional mode of proceeding for the trial of the title to offices." [43] People v. Stevens, 5 Hill, 631, note "a," per Kent, Chief Judge.

The motion for a peremptory mandamus must therefore be denied.[44]

[42] In a proper case the action of a canvassing board will be controlled by mandamus: People ex rel. Nichols v. Board of County Canvassers of Onondaga County, 129 N. Y. 395, 29 N. E. 327, 14 L. R. A. 624 (1891); People ex rel. Daley v. Rice, 129 N. Y. 449, 29 N. E. 355, 14 L. R. A. 643 (1891); People ex rel. Derby v. State Board of Canvassers, 129 N. Y. 461, 29 N. E. 358 (1891); Rosenthal v. State Board of Canvassers, 50 Kan. 129, 32 Pac. 129, 19 L. R. A. 157 (1893).

[43] In the case of a clerk, mandamus is proper, since quo warranto is unavailable. People ex rel. Drake v. Sutton, 88 Hun, 175, 34 N. Y. Supp. 487 (1895).

[44] See, also, State, etc., v. Lewis, 35 N. J. Law, 377 (1872).

PEOPLE ex rel. BARTLETT et al. v. DUNNE, Mayor.

(Supreme Court of Illinois, 1906. 219 Ill. 346, 76 N. E. 570.)

Motion by the People, on the relation of one Bartlett and others, for leave to file a petition for a writ of mandamus against Edward F. Dunne, Mayor of Chicago. Denied.

CARTWRIGHT, C. J. Yesterday the relators moved for leave to file a petition for mandamus, and presented the petition, with suggestions in support of it. At that time the corporation counsel of the city of Chicago stated to the court that he had prepared an argument against the motion, which was presented to the court, and since that time a reply to his argument has been presented by the relators. The application in this class of cases is ex parte, and nothing has been or will be considered except the petition of the relators, with the accompanying suggestions in support of the motion.

The petition sets out that the defendant, Edward F. Dunne, is mayor of the city of Chicago; that previous to the election he declared that, if elected, he would not enforce the laws of the state and the ordinances of the city respecting the keeping open of tippling houses on the Sabbath day; and that since his election he has neglected and refused to enforce such laws and ordinances, and has declared his deliberate intention to violate his duty in that respect and not to enforce either of them or to punish violators of them. Attention is called to the statute which imposes upon the mayor the duty and obligation to see that the laws and ordinances are faithfully executed, and the obligation assumed by him as mayor to do so.

The prayer of the petition is that this court will issue the peremptory writ of mandamus to the defendant, enjoining and commanding him, without delay, and by the use, as far as may be necessary for the purpose, of every means, power, and authority in that behalf conferred upon the mayor of said city by the laws of this state or the ordinances of the city of Chicago, to proceed, and thenceforth persistently to continue, to enforce within said city the statute of this state prohibiting the keeping open upon the first day of the week, called Sunday, of tippling houses and other places where liquor is sold or given away, and to compel the general observance of the provisions of said law in said city on each and every Sunday thereafter by every person amenable thereto, and to prevent the violation thereof, and secure the prosecution of every person violating the said law in said city, and to punish all violations of said law by licensed dramshop keepers in said city by the revocation of their licenses, and generally and at all times to take care that said law is faithfully executed in said city.

The remedy by mandamus is one which is allowed to compel the performance of some duty owing to an individual or to the public. The duty must be specific in its nature, and of such character that

the court can prescribe a definite act or series of acts which will constitute a performance of the duty, so that the respondent may know what he is obliged to do and may do the act required, and the court may know that the act has been performed and may enforce its performance. It is not necessary, in all cases, that the performance of the duty should consist of a single act. It may be a succession of acts, if the duty is specific and the acts are of such a nature that the court can supervise the performance of the duty and the execution of the mandate. For example, the court may require a railroad company to relay a portion of its track which has been taken up, and operate it; to operate its railway as a continuous line; to deliver freight to a certain elevator; to run a daily passenger train for the accommodation of passengers over its road, in place of a mixed stock and passenger train; or to stop all its passenger trains at a certain station. But the writ has never been made use of, and does not lie, in this state at least, for the purpose of enforcing the performance of duties generally. It will not lie where the court would have to control and regulate a general course of official conduct and enforce the performance of official duties generally. In such a case the court could not prescribe the particular act to be performed and enforce its performance.

It is plain that in this case, where the court is asked to require the defendant to adopt a course of official action, although it is a course required by the statute and imposed upon him by the law, it would be necessary for the court to supervise generally his official conduct, and to determine in very numerous instances whether he had persistently, and to the extent of his power and the force in his hands, carried out the mandate of the court and performed his official duty. It is manifest that, where there are about 7,000 saloons in a city which are kept open on the Sabbath day in violation of law, as is alleged in this case, the court would not only have to enforce a general course of official conduct on the part of the mayor, but must also determine in numerous instances whether ground existed for the revocation of licenses, whether there had been violations of law, and to what extent he had endeavored to perform his duty with the force and facilities at his command for doing it. The writ will not lie for any such purpose.

For the court to assume the management of municipal affairs in the city of Chicago would be to depart from its proper sphere and assume governmental functions, which are outside of the jurisdiction of the courts and not within the remedy by writ of mandamus. Leave to file the petition is denied.

Motion denied.[45]

[45] A writ of mandamus was subsequently refused to enforce the law against one owner of two saloons. People ex rel. Bartlett v. Busse, 238 Ill. 593, 87 N. E. 840 (1909).

See, also, State ex rel. Wear v. Francis, 95 Mo. 44, 8 S. W. 1 (1888); State

SECTION 54.—SAME—CONTROL OF FAIRNESS OF DISCRETION

UNITED STATES ex rel. ROOP v. DOUGLASS.

(Supreme Court of District of Columbia, 1890. 19 D. C. 99.)

JAMES, J.[46] * * * There is nothing alarming in the term discretionary power. It has a legal meaning, with safe limitations. The intendment of a law which grants it, whether expressly or by implication, is that the discretionary decision shall be the outcome of examination and consideration; in other words, that it shall constitute a discharge of official duty, and not a mere expression of personal will. An arbitrary disapproval of a license, for example, determined upon without an examination of relevant facts, and expressing nothing but the mood of the officer, would not be, in contemplation of law, an exercise of the power granted. It would constitute, on the contrary, a neglect and refusal to perform his official functions, and would expose him to the interference of this court by the writ of mandamus. To what effect, however, would be a distinct question.

If, then, the respondents had discretionary power, what averments must their return contain, in justification of their refusal to issue a license? We have said that the rule of certainty applies only to the pleading of those facts which constitute the tests or conditions of their power, and which show that it has been lawfully exercised. So is it necessary, then, to state with certainty anything more than the fact that they have made an examination in obedience to the implied requirement of the law, and the further fact that, upon such examination, they believe that a license should not be granted to the petitioners, either because they are not fit persons, or because a barroom should not, as a matter of public interest, be licensed in conjunction with the Globe Theater? Is it necessary that they should also state with certainty, so as to establish them as facts, or state at all, the matters of fact on which they based their decision? * * *

The special reasons for respondents' decision—that is to say, the alleged fact that robberies were committed at the Globe Theater, and

ex rel. Hawes v. Brewer, 39 Wash. 65, 80 Pac. 1001, 109 Am. St. Rep. 858 (1905).

As to mandamus against the Governor, see 3 Michigan Law Review, p. 631.

Pasmore v. Oswaldthistle Urban Council, [1898] A. C. 387 (House of Lords). The duty of a local authority under section 15 of the Public Health Act, 1875, to make such sewers as may be necessary for effectually draining their district, cannot be enforced by mandamus brought by a private person. The only remedy for the neglect of the duty is that given by section 259 of the act, a complaint to the local government board.

[46] Only a portion of the opinion of James, J., is printed.

that it was the resort of thieves and disorderly persons—were stated unnecessarily, and it is immaterial whether they are pleaded with that degree of certainty which will establish them as facts. * * *[47]

DEVIN v. BELT.

(Court of Appeals of Maryland, 1889. 70 Md. 352, 17 Atl. 375.)

YELLOTT, J. The Act of 1884, c. 283, § 5, local in its application and designated as the high license law of Prince George's county, provides that, in addition to the usual license required by the state, all applicants for liquor licenses shall, before obtaining said licenses, pay to the clerk of the circuit court the sum of one hundred dollars for the use of the public roads of said county. The act provides "that no spirituous or fermented liquors, or alcoholic bitters, shall be sold in any election district of said county except as provided for by section five," and it is further enacted "that each and every applicant, person or persons, house, corporation, company or association shall be recommended to the said clerk by five respectable freeholders of his or their immediate vicinity, as a fit person to traffic in the article."

Having conformed with the provisions of this act, the appellant obtained licenses to sell liquor at his storehouse in the town of Laurel, in Laurel district of Prince George's county, for the period of one year. The licenses were issued on the 1st of November, 1887. At its session of 1888 the Legislature of Maryland enacted a law submitting to the voters of Laurel district the question in relation to issuing licenses to sell liquor in that district after the 1st day of May

[47] "Here the court of mayor and aldermen have not determined without evidence, for they have heard the parties and their witnesses, and have adjudicated that, in their discretion and sound consciences, Mr. Scales is not a fit and proper person to be alderman. They have acted, therefore, upon a reasonable and legal custom, and, having so acted, it appears to me that this court has not jurisdiction to disturb that conclusion to which they have come according to their discretion and sound consciences. But then it is said that they ought to have set forth the grounds upon which they arrived at that conclusion. I think that this is one of those cases in which it is probably much better that the grounds should not be disclosed, because the circumstances which regulate the exercise of a discretion like this may be such that it would be extremely inconvenient for a traverse to be taken. It is unnecessary, however, to proceed upon that reasoning, because this return is sufficiently justified by the cases cited [Rex v. Mayor of Stratford-on-Avon, 1 Lev. 291 (1670); Rex. v. Burgesses of Andover, 1 Ld. Raym. 710 (1701); Rex v. Bishop of London, 13 East, 419 (1811); Queen v. Burgesses of Ipswich, 2 Ld. Raym. 1240 (1705)], and more might have been adduced, which show that, where a corporate office is held durante bene placito, it is a sufficient return to a mandamus that the corporation have determined their pleasure; but if the corporation are so candid as to state their reasons, and allege bad ones, this court will in such cases interfere." Rex v. Mayor and Aldermen of London, 3 Barn. & Ad. 255, 273, 274.

in said year, and the majority of votes determined the question in favor of prohibiting the issuing of licenses in said district. On the 1st day of June, 1888, the appellant applied to the clerk for transfers of his licenses to sell liquor, from Laurel to an adjoining district, claiming to be recommended by five respectable freeholders, living in the immediate vicinity of his new place of business. The transfers were refused by the clerk, who did not think that the appellant was recommended by five respectable freeholders living in his immediate vicinity. The record contains the recommendation of five persons who were unable to write, and therefore made their marks. The appellant then applied for a new state license. The clerk refused to grant a new license, because the appellant would not pay the $100 required by law. He also assigned this as one of his reasons for refusing to make the transfers.

Upon this refusal the appellant applied for a writ of mandamus to compel the clerk to issue the new licenses or transfer the old licenses. The clerk filed his answer, the appellant demurred, and the demurrer was overruled. The appellant then filed a replication, to which there was a demurrer. This demurrer was sustained, and the court passed an order dismissing the appellant's petition. From this order an appeal has been taken.

It does not seem to be necessary to consider and determine many of the questions presented by the argument of counsel, for it is an established principle that a court will not issue a mandamus to compel a public officer to perform any act when its performance has been left by the lawmaking department of the government to the discretion and judgment of the officer. In State ex rel. O'Neill v. Register et al., 59 Md. 283, this court decided that when an act rests by statute in the discretion of any person, or depends upon the exercise of personal judgment, mandamus will not lie. This doctrine has been recognized and seems to prevail in all the states of this country. "As to all acts or duties necessarily calling for the exercise of judgment or discretion on the part of the officer or body at whose hands the performance is required, mandamus will not lie." High on Extr. Rem. § 24; State ex rel. Exchange Bank v. Board of Liquidators, 29 La. Ann. 264; Post v. Township of Sparta, 64 Mich. 597, 31 N. W. 535; State v. County Com'rs, 21 Fla. 1; Dalton v. State, 43 Ohio St. 652, 3 N. E. 685.

The clerk of Prince George's county, in the performance of a duty imposed on him by law, had to determine, before he issued a license, that the appellant was recommended by five persons; that those five persons lived in the immediate vicinity of his place of business; that they were freeholders; and that, although so ignorant and illiterate that they could not write their names, they were respectable freeholders. It is apparent that this question of respectability sometimes presents many difficulties. It was a duty incum-

bent on the clerk to solve this question, and he might not be able to arrive at a solution until after patient inquiry and the exercise of sound judgment and discretion, and a mandamus will not lie.

The appellant contends that, as he averred in his replication that he was recommended by five respectable freeholders in his immediate vicinity, the demurrer to the replication admits the truth of the averment. This argument is not supported by established principles. In Brooke v. Widdicombe, 39 Md. 400, the late Chief Judge Bartol, in delivering the opinion of this court, said: "The answer avers that the petitioner was not legally elected to the office; but that the respondent actually received a plurality of the votes cast. In the argument of the case it was earnestly insisted on the part of the appellant that the effect of the demurrer was to admit the facts thus stated in the answer, and consequently that the appellee is in the attitude of claiming an office to which he admits by his pleading he was not legally elected. Such is not the legal effect of the demurrer. It is well settled that a demurrer admits no other facts than those which are well pleaded. If facts are pleaded which are insufficient in substance, or immaterial, they are not admitted by the demurrer to be true; its office is to assert a legal proposition that the pleading demurred to is insufficient in law to maintain the case shown by the adverse party."

From what has been said it follows that the order appealed from must be affirmed.[48]

AMPERSE v. CITY OF KALAMAZOO.

(Supreme Court of Michigan, 1886. 59 Mich. 78, 26 N. W. 222, 409.)

Relator applied for an order to show cause why a mandamus should not issue requiring the common council of the city of Kalamazoo to act upon the approval of her bond as a liquor dealer in said city, which was granted, to which respondent made answer. The facts are stated in the opinions.

MORSE, J.[49] * * * Two reasons are urged why the writ should not issue in this case: First, because the relator is a married woman, living with her husband, and is therefore legally disqualified from lawfully engaging in the business of selling liquor; second, that the common council have a right to reject a liquor bond, and they are not required to give any reason for their action. * * *

The duty of this board, under the statute, is a simple one. They are concerned, under the law, solely with these questions: Is the bond

[48] See, also, Post v. Township Board of Sparta, 64 Mich. 597, 31 N. W. 535 (1887).

[49] Only a portion of the opinion of Morse, J., is printed.

proper in form and the penalty named therein sufficient? Are the bondsmen residents of the municipality and financially responsible for their undertaking? If they are not satisfied as to any of these matters, it is their duty to reject the bond, and to acquaint the petitioner with the ground upon which they reject it, so the bond may be remedied, if possible. If these questions are found in the affirmative, it is the duty of the board to approve it. They have no power to arbitrarily reject a bond without having any valid reason, or without assigning any good reason therefor. And we think the reason for rejecting a bond should appear of record. If not, then we shall have a common council rejecting a bond, each member of the body locking up in his own breast the reason therefor, and when called upon by a court to show the ground of their action, at liberty to assign any cause it may seem best, under the circumstances, whether it be the real cause at the time of their action or not. A person engaging in the sale of liquors is entitled to the same equal rights, under the law, as persons filing bonds under other circumstances, no matter what may be the opinion of individual members of the board, whose duty it is to approve the bond, as to the policy of the law or the character of the business; and no captious or arbitrary actions in depriving him of his rights can be tolerated by the courts.

It was held by this court, in Parker v. Portland, 54 Mich. 308, 20 N. W. 55, that when the board have exercised their judgment and discretion in good faith, and passed upon the bond, mandamus would not lie to control their decision or action, if there was no abuse of their discretion; but there is no authority in that case to sustain the arbitrary action of this board, who acted without any legal judgment or discretion, but, in the language of one of the members, took their chances of disobeying the plain mandate of the statute, and who, when called upon to explain or justify their action, return to this court, in substance: "We did this because we had the right and power to do it, and it is no one's business what our reasons were for rejecting this bond." It was expressly held in Parker v. Portland that, when the rejection of a liquor bond "was the result of prejudice and caprice," it would be the duty of this court to grant relief. Such is plainly the case before us. * * *

The respondents in this case have seen fit to rest their cause upon the broad ground that their action is above and beyond the criticism of any other tribunal. Their answer assumes that they are the sole arbiters of the relator's right to engage in the business of selling liquor. Whether they have any good reason for their action for some cause they decline to inform us. In such case we can only assume that they have acted arbitrarily and without reason. To allow such action would be in plain violation of the statute, and a manifest disregard of the rights of the relator under it.

The writ of mandamus must issue in this case to respondents to approve forthwith the bond presented by relator, with costs in her favor.[50]

STATE ex rel. COFFEY v. CHITTENDEN.

(Supreme Court of Wisconsin, 1902. 112 Wis. 569, 88 N. W. 587.)

MARSHALL, J.[51] It is elementary that in mandamus proceedings to coerce a judicial officer or any person or board in the exercise of judicial or quasi judicial power, the sole legitimate purpose thereof is to set such person or board in motion; to command him or it to act, not how to act, to exercise the judicial power vested in him or it; not to control as to the conclusion to be reached. State v. Kellogg, 95 Wis. 672, 70 N. W. 300; State v. Johnson, 103 Wis. 591, 623, 79 N. W. 1081, 51 L. R. A. 33; State v. Teal, 72 Minn. 37, 74 N. W. 1024; Merrill, Mand. 40. Where there is no reasonable ground to justify a decision by such officer or board other than one way, and there is a failure to act accordingly, the function of a mandamus proceeding is broad enough to remedy the mischief by compelling the making of such decision, in perfect harmony with the rule that the office thereof is not to control discretionary authority, but to compel the exercise thereof. State v. Johnson, supra. That is to say, if the law imposes the duty upon a judicial or quasi judicial body to do a particular thing upon determining that certain facts exist, and reasonable inquiry be made by it in respect to such facts, and from the information thus obtained there is no reasonable ground for any conclusion other than that the conditions precedent to the performance of such duty exist, and a decision is made to the contrary or performance thereof is refused, such conduct is not the exercise of discretionary power, but a refusal to exercise it—a refusal or neglect to perform a plain duty imposed by law; and, there being no adequate legal remedy, the way is open for the extraordinary jurisdiction of the court to award its writ of mandamus. It is plain that, in such a situation, the court does not deal with disputed facts. It acts upon the theory that the person or body in duty bound to find the facts in accordance with the evidence, in refusing to do so, goes beyond or refuses to exercise his or its jurisdiction, and is, on that ground alone, a subject for coercion by mandamus. State v. Johnson, supra. * * *[52]

[50] Accord: State ex rel. Adamson v. La Fayette Co., 41 Mo. 221 (1867). See, also, Ex parte Candee, 48 Ala. 386 (1872), disapproved in Ex parte Harris, 52 Ala. 87, 93, 23 Am. Rep. 559 (1875).

[51] Only a portion of the opinion of Marshall, J., is printed.

[52] See a note in 6 Mich. Law Review, p. 242.

SECTION 55.—MANDAMUS IN THE COURTS OF THE UNITED STATES

KENDALL v. UNITED STATES ex rel. STOKES.

(Supreme Court of United States, 1838. 12 Pet. 524, 9 L. Ed. 1181.)

THOMPSON, J.[53] * * * The next inquiry is, whether the court below [54] had jurisdiction of the case, and power to issue the mandamus? This objection rests upon the decision of this court, in the cases of McIntire v. Wood, 7 Cranch, 504, 3 L. Ed. 420, and McClung v. Silliman, 6 Wheat. 598, 5 L. Ed. 340. It is admitted that those cases have decided that the Circuit Courts of the United States, in the several states, have not authority to issue a mandamus against an officer of the United States. * * *

The result of these cases, then, clearly is that the authority to issue the writ of mandamus to an officer of the United States, commanding him to perform a specific act required by a law of the United States, is within the scope of the judicial powers of the United States under the Constitution, but that the whole of that power has not been communicated by law to the Circuit Courts, or, in other words, that it was then a dormant power, not yet called into action, and vested in those courts, and that there is nothing growing out of the official character of the party that will exempt him from this writ, if the act to be performed is purely ministerial.

It must be admitted, under the doctrine of this court in the cases referred to, that unless the circuit court of this District is vested with broader powers and jurisdiction in this respect than is vested in the Circuit Courts of the United States in the several states, then the mandamus in the present case was issued without authority. But in considering this question it must be borne in mind that the only ground on which the court placed its decision was that the constitutional judicial powers on this subject had not been imparted to those courts. * * *

But let us examine the act of Congress of the 27th of February, 1801, concerning the District of Columbia, and by which the circuit court is organized, and its powers and jurisdiction pointed out. And it is proper, preliminarily, to remark that under the Constitution of the United States, and the cessions made by the states of Virginia and Maryland, the exercise of exclusive legislation, in all cases whatsoever, is given to Congress. And it is a sound principle that, in

[53] For first part of opinion, see ante, p. 434.
Only portions of the opinions of Thompson and Catron, JJ., are here printed.
[54] The circuit court of the District of Columbia.

every well-organized government, the judicial power should be coextensive with the legislative, so far, at least, as private rights are to be enforced by judicial proceedings. There is, in this District, no division of powers between the general and state governments. Congress has the entire control over the District, for every purpose of government; and it is reasonable to suppose that, in organizing a judicial department here, all judicial power necessary for the purposes of government would be vested in the courts of justice. The circuit court here is the highest court of original jurisdiction; and if the power to issue a mandamus in a case like the present exists in any court, it is vested in that court.

Keeping this consideration in view, let us look at the act of Congress. The first section declares that the laws of the state of Maryland, as they now exist, shall be and continue in force in that part of the District which was ceded by that state to the United States, which is the part lying on this side the Potomac, where the court was sitting when the mandamus was issued. It was admitted on the argument that at the date of this act the common law of England was in force in Maryland, and, of course, it remained and continued in force in this part of the District; and that the power to issue a mandamus in a proper case is a branch of the common law cannot be doubted, and has been fully recognized as in practical operation in that state, in the case of Runkel v. Winemiller, 4 Har. & McH. 448, 1 Am. Dec. 411. * * *

There can be no doubt but that, in the state of Maryland, a writ of mandamus might be issued to an executive officer, commanding him to perform a ministerial act required of him by law; and if it would lie in that state, there can be no good reason why it should not lie in this district, in analogous cases. * * *

Thus far the power of the circuit court to issue the writ of mandamus has been considered as derived under the first section of the act of 27th February, 1801. But the third and fifth sections are to be taken into consideration in deciding this question. The third section, so far as it relates to the present inquiry, declares "that there shall be a court in this dictrict, which shall be called the circuit court of the District of Columbia; and the said court, and the judges thereof, shall have all the powers by law vested in the Circuit Courts and the judges of the Circuit Courts of the United States." And the fifth section declares "that the said court shall have cognizance of all cases, in law and equity, between parties, both or either of which shall be resident or be found within the District." * * * This, of course, means cases of judicial cognizance. That proceedings on an application to a court of justice for a mandamus are judicial proceedings cannot admit of a doubt; and that this is a case in law is equally clear. It is the prosecution of a suit to enforce a right secured by a special act of Congress, requiring of the Postmaster General the performance of a precise, def-

inite and specific act, plainly enjoined by the law. It cannot be denied but that Congress had the power to command that act to be done; and the power to enforce the performance of the act must rest somewhere, or it will present a case, which has often been said to involve a monstrous absurdity in a well-organized government, that there should be no remedy, although a clear and undeniable right should be shown to exist. And if the remedy cannot be applied by the circuit court of this District, it exists nowhere. But by the express terms of this act the jurisdiction of this circuit court extends to all cases in law, etc. No more general language could have been used. An attempt at specification would have weakened the force and extent of the general words—all cases. Here, then, is the delegation to this circuit court of the whole judicial power in this District, and in the very language of the Constitution, which declares that the judicial power shall extend to all cases in law and equity, arising under the laws of the United States, etc., and supplies what was said by this court in the cases of McIntire v. Wood and McClung v. Silliman, to be wanting, viz.: That the whole judicial power had not been delegated to the Circuit Courts in the states, and which is expressed in the strong language of the court, that the idea never presented itself to any one that it was not within the scope of the judicial powers of the United States, although not vested by law in the courts of the general government. * * *

The judgment of the court below is accordingly affirmed.

CATRON, Justice (dissenting). * * * On the merits, I think the Senate of the United States, and the Solicitor of the Treasury, construed the special act of Congress correctly, and that the Solicitor's award is a final adjudication, and conclusive of the rights of the relators.

But the question whether the circuit court of this District had power to compel the Postmaster General, by mandamus, to enter a credit for the amount awarded, lies at the foundation of our institutions. A question more grave or important rarely arises. Coercion, by the writ of mandamus, of the officers and agents of a government, is one of the highest exertions of sovereignty known to the British constitution and common law. It is truly declared to be one of the flowers of the King's Bench (3 Bl. Com. 110, note), and in England can only be enforced by that court, where the king formerly sat in person, and is now deemed to be potentially present. It is his command, in his own name, directed to a court, person or corporation, to do a particular thing therein specified, which appertains to their office or duty, as a means of compelling its performance. 3 Bl. Com. c. 7. The proceeding there, as here, is in the name of the government, and not that of the relators; it stands on the foot of contempt, and is intended to reform official delinquency.

By the act of independence, this prerogative and portion of sovereignty, unimpaired, devolved on the different states of this Union;

and by the Constitution of the United States, such portion of it as was necessary to coerce the courts, officers and agents of the general government was withdrawn from the states, and conferred on the federal sovereignty. Here the power lay dormant, until Congress should act. On the Legislature was imposed the duty to give it effect; it was wide as the land, and extended to every portion of it; and by the judiciary act of 1789 (section 13) Congress attempted to invest the Supreme Court of the United States with the power to issue writs of mandamus to persons holding office under the authority of the United States. But the Constitution having restricted this court to the exercise of certain original powers, and this not being amongst them, it was holden, in Marbury v. Madison, 1 Cranch, 137, 2 L. Ed. 60, so much of the act was void. The decision was made in 1803; up to that time, Congress and the country did not question that a law existed, proper and necessary to give effect to the prerogative, through the instrumentality of this court, and that it was properly vested in the highest tribunal in the land, exercising a jurisdiction coextensive with our whole territory. So the matter stood, when the act of the 27th February, 1801, was passed, organizing the circuit court for the District of Columbia. And the question is, did Congress, by implication, confer, or intend to confer, this high prerogative, within the ten miles square, on the circuit court? That concurrent power with the Supreme Court was intended to be given it is difficult to believe. * * *

It is admitted, and was so decided in McIntire v. Wood, that none other of the Circuit Courts of the United States, holden by the judges of the Supreme Court, have the power claimed for the court in this District, and that throughout the twenty-six states of the Union this high prerogative writ cannot be exerted, because Congress, since the decision in 1803, in the case of Marbury v. Madison, has not seen proper to vest it in these inferior tribunals; nor is it matter of surprise, when we recollect to what extent the executive departments would have been subjected to the judicial power.

Should we, then, by doubtful implication and a strained construction, apply this highest of judicial powers, in its nature broad as the Union, to this ten miles square? That the power can only be maintained to exist by implication, and not by express enactment, is admitted on all hands. It never was attempted to be conferred, in express terms, save on the Supreme Court; and is the construction that invokes it for the circuit court of this District a strained one? The tenth section of the repealed act of the 13th of February, 1801, declares "that the circuit courts then established shall have, and are hereby invested with, all the powers heretofore granted by law to the Circuit Courts of the United States, unless otherwise provided by this act." There is no repealing clause to the act. The section quoted refers directly to the fourteenth section of the act of 1789, for the powers common to all the Circuit Courts of the Union. They

have stood unaltered, and been recognized, with slight exceptions, as the sole powers by which the jurisdiction of the Circuit Courts has been enforced, from the year 1789 to this time.

It is insisted, however, that the jurisdiction conferred on the circuit court by the eleventh section of the repealed act of the 13th of February, 1801, is much broader than that given to them by the eleventh section of the act of 1789; that the act of 1801 covers the whole ground of the Constitution. This is certainly true; but the fifth section of the act of the 27th of February, 1801, declaring what matters shall be cognizable in the circuit court for the District of Columbia, confers jurisdiction quite as comprehensive. Its cognizance (or jurisdiction "to hold plea") extends to all crimes and offenses, and to all cases in law and equity, provided the defendant be found in the district. Thus, as the eleventh sections of the act of 1789 and the 13th of February, 1801, each have reference to the exercise of jurisdiction, in suits or actions between litigant parties, or over matters in some form brought before the court to try and ascertain a contested right, it would be a most unnatural construction to hold (as I think) that the phrase "cognizance of all cases in law and equity" authorized the court to assume the high power of coercing by mandamus one of the Secretaries, or the Postmaster General, to the performance of some specific public duty, in case of an ascertained right, by force of the strong arm of sovereign power, because he was a public officer; and who was not a suitor in court, or party to a case in law or equity. * * *

The truth, there can be little room for doubt, is that Congress has been unwilling to expose the action of the government, in the administration of its vast and complicated affairs, and its officers, who have charge of their management, to the danger and indignity of being coerced and controlled, at the ill-defined discretion of the inferior courts, by the writ of mandamus, and that after the decision of Marbury v. Madison, in 1803, holding that the Supreme Court had not the power thus to coerce an officer of the United States, it has been permitted to lie dormant, awaiting the action of the Legislature. The supposition is rendered highly probable, when we consider the delicacy its exercise would necessarily involve, and the difficulty of vesting so high and extensive a power in the inferior courts, and especially, in those of this District, in a modified and safe form.

Such being my own opinion, I think the order awarding the mandamus against the Postmaster General should be reversed, for want of jurisdiction in the court below to issue the writ.

Judgment affirmed.[55]

[55] It was held in United States v. Schurz, 102 U. S. 378, 393, 394, 26 L. Ed. 167 (1880), that the revision of the statutes of the United States did not affect the jurisdiction of the Supreme Court of the District of Columbia to issue writs of mandamus.

BATH COUNTY v. AMY.

(Supreme Court of United States, 1871. 13 Wall. 244, 20 L. Ed. 539.)

Error to the Circuit Court for the District of Kentucky; the case being thus:

The eleventh section of the judiciary act of 1789, enacts that "the Circuit Court shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law, * * * between a citizen of the state where the suit was brought and a citizen of another state."

The fourteenth section of the same act, referring to certain courts of the United States, including the Circuit Courts, enacts: "That all the before-mentioned courts of the United States shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." * * *

With those statutes in force, the Legislature of Kentucky incorporated, A. D. 1852, the Lexington & Big Sandy Railroad Company. By the charter of the railroad the county courts of the different counties, through which it was to run, were authorized to subscribe to the stock of the road, and to pay their subscriptions by borrowing money, making the money borrowed payable in the way in which the county courts should deem most advisable. The interest on all such sums borrowed was to be provided for in like manner, provided that all taxes laid to pay either principal or interest should be sacredly appropriated to such purpose and no other. A subsequent act required the county courts to issue bonds, and to proceed to levy, assess, and collect a tax to pay the interest thereon, according to the true intent and meaning of the previous act.

The county of Bath subscribed $150,000, and issued one hundred and fifty bonds of $1,000 each, payable thirty years from date, with interest semiannually, for which coupons were annexed. And the company, having indorsed them, sold and put them into circulation. The county court levied the tax and paid the interest for five years, and then stopped payment.

In this state of things one Amy, of New York, being the holder of eighty-two of the bonds, with the overdue and unpaid coupons, in November, 1866, made a written demand upon the justices, who composed the county court of Bath county, requiring the court forthwith to levy the necessary tax to pay his coupons, and notified to each of the judges that, if they did not do so, he would on the second day of the next term of the Circuit Court of the United States, sitting in the district, move that court for the writ of mandamus requiring them to do it. No tax was levied; and at the next term of the Circuit Court, Amy accordingly filed an affidavit in the nature of an information,

setting forth specifically his case, and concluding with a prayer for a mandamus requiring the tax to be levied. The court granted a rule against the county to show cause why the writ should not issue. The county came and craved oyer of the bonds and coupons, which was had, upon which it moved the court to discharge the rule, and also filed a response to the rule setting forth eleven points of defense.

By agreement of counsel a general traverse of the facts set out in the response was entered on the record, and the law and facts submitted to the court for trial and decision. Upon the trial, the court found the issues for the plaintiff, and gave judgment awarding a peremptory writ of mandamus. To reverse this judgment the county brought the case here; the chief ground of the argument of their counsel, Messrs. M. Blair, J. G. Carlisle, and J. B. Beck, being that under the fourteenth section of the act of September 24, 1789, the Circuit Court of the United States had no jurisdiction to issue a writ of mandamus, there having been no previous judgment of the court in favor of the party holding the obligations, and no previous attempt made by it to enforce their payment by its ordinary process.

Mr. Justice STRONG delivered the opinion of the court.[56]

It must be considered as settled that the Circuit Courts of the United States are not authorized to issue writs of mandamus, unless they are necessary to the exercise of their respective jurisdictions. Those courts are creatures of statute, and they have only so much of the judicial power of the United States as the acts of Congress have conferred upon them. The judiciary act of 1789, which established them, by its eleventh section, enacted that they shall have original cognizance, concurrently with the courts of the several states, of "all suits of a civil nature at common law, or in equity," between a citizen of the state in which the suit is brought and a citizen of another state, or where an alien is a party. While it may be admitted that, in some senses, the writ of mandamus may properly be denominated a suit at law, it is still material to inquire whether it was intended to be embraced in the gift of power to hear and determine all suits at common law, of a civil nature, conferred by the judiciary act.

At the time when the act was passed it was a high prerogative writ, issuing in the king's name only from the Court of King's Bench, requiring the performance of some act or duty, the execution of which the court had previously determined to be consonant with right and justice. It was not, like ordinary proceedings at law, a writ of right, and the court had no jurisdiction to grant it in any case except those in which it was the legal judge of the duty required to be performed. Nor was it applicable, as a private remedy, to enforce simple common-law rights between individuals. Were there nothing more, then, in the judiciary act than the grant of general authority to take cognizance of all suits of a civil nature at common law, it might

[56] Only a portion of the opinion is printed.

well be doubted whether it was intended to confer the extraordinary powers residing in the British Court of King's Bench to award prerogative writs.

All doubts upon this subject, however, are set at rest by the fourteenth section of the same act, which enacted that Circuit Courts shall have "power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute which may be necessary to the exercise of their respective jurisdictions and agreeable to the principles and usages of law." Among those other writs, no doubt, mandamus is included; and this special provision indicates that the power to grant such writs generally was not understood to be granted by the eleventh section, which conferred, only to a limited extent, upon the Circuit Courts the judicial power existing in the government under the Constitution. Power to issue such writs is granted by the fourteenth section, but with the restriction that they shall be necessary to the exercise of the jurisdiction given. Why make this grant if it had been previously made in the eleventh section? The limitation only was needed.

This subject has heretofore been under consideration in this court, and in McIntire v. Wood, 7 Cranch, 504, 3 L. Ed. 420, it was unanimously decided that the power of the Circuit Courts to issue the writ of mandamus is confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction. The court said: "Had the eleventh section of the judiciary act covered the whole ground of the Constitution, there would be much reason for exercising this power in many cases wherein some ministerial act is necessary to the completion of an individual right arising under laws of the United States, and the fourteenth section of the act would sanction the issuing of the writ for such a purpose. But, although the judicial power of the United States extends to cases arising under the laws of the United States, the Legislature have not thought proper to delegate the exercise of that power to its Circuit Courts, except in certain specified cases." And in McClung v. Silliman, 6 Wheat. 601, 5 L. Ed. 340, this court said, when speaking of the power to issue writs of mandamus: "The fourteenth section of the act under consideration [the judiciary act] could only have been intended to vest the power * * * in cases where the jurisdiction already exists, and not where it is to be courted or acquired by means of the writ proposed to be sued out." In other words, the writ cannot be used to confer a jurisdiction which the Circuit Court would not have without it. It is authorized only when ancillary to a jurisdiction already acquired. The doctrine asserted in both these cases was conceded to be correct by both the majority and the minority of the court in Kendall v. United States, 12 Pet. 524, 9 L. Ed. 1181. The power to issue a writ of mandamus as an original and independent proceeding does not, then, belong to the Circuit Courts. * * *

Applying this rule to the present case, it is decisive. The relator's

claim for payment had not been brought to judgment in the Circuit Court, nor had it been put in suit. His application for a mandamus was, therefore, an original proceeding, neither necessary nor ancillary to any jurisdiction which the court then had. For this reason it should have been denied, and the judgment that a peremptory mandamus should issue was erroneous.

Judgment reversed, and the cause remanded with instructions to dismiss the petition for a mandamus.[57]

UNITED STATES ex rel. SEEGER v. PEARSON, Postmaster.

(Circuit Court of United States, S. D. New York, 1887. 32 Fed. 309.)

Mandamus.

The relator alleges that he is the editor and proprietor of a newspaper periodical called "Medical Classics," and has requested the defendant, who is the postmaster of New York, to enter and transmit through the mails this publication as second-class matter. This request was refused by the defendant, and the publication was charged a higher rate of postage, as third-class matter, because held to be designed as an advertising medium. The relator denies any such purpose. On appeal by the relator to the First Assistant Postmaster General, this refusal was sustained; and the relator brings this proceeding to compel the defendant, by mandamus, to receive and transmit the publication as second-class matter.

BROWN, J. I am constrained, by the weight of authority, to decline to entertain this proceeding by mandamus. A long line of decisions of the Supreme Court has affirmed the broad doctrine that the Circuit Court has no jurisdiction to issue a writ of mandamus as an original proceeding, but only as ancillary to some other proceedings or right of which it has jurisdiction.

Considering that the fourth subdivision of section 629 of the Revised Statutes (U. S. Comp. St. 1901, p. 503) gives the Circuit Court express jurisdiction "of all causes arising under the postal laws" (Act March 3, 1845, 5 Stat. 739), and that the fourteenth section of the judiciary act (section 716, Rev. St. [page 580, U. S. Comp. St.]) authorizes the federal courts to issue such writs whenever "necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law," it might have been inferred, in the absence of authority, that if the relator was entitled to the relief demanded, according to the general usage and practice

[57] So Rosenbaum v. Bauer, 120 U. S. 450, 7 Sup. Ct. 633, 30 L. Ed. 743 (1887).

As to power of federal courts to issue mandamus to municipal corporations to levy taxes required for the payment of judgments, as an ancillary jurisdiction to the enforcement of judgments recovered in those courts, see Riggs v Johnson Co., 6 Wall. 166, 18 L. Ed. 768 (1867).

of the law, and if a writ of mandamus was the proper remedy for such relief, the writ might have been issued in the exercise of the proper jurisdiction of the court, inasmuch as the cause is one arising exclusively "under the postal laws."

Upon repeated examination of the decisions of the Supreme Court, however, I cannot find myself authorized to treat this question as an open one. In most of the cases in which the question has arisen, the Circuit Court had undoubted original jurisdiction of the subject-matter of the proceedings, under some one or other of the express provisions of the statutes, quite as clear as is its authority to determine "all causes arising under the postal laws." Nevertheless, the right to pursue the remedy by means of an original writ of mandamus has been uniformly denied. McIntire v. Wood, 7 Cranch, 504, 3 L. Ed. 420; McClung v. Silliman, 6 Wheat. 598, 5 L. Ed. 340; Bath Co. v. Amy, 13 Wall. 244, 20 L. Ed. 539; Graham v. Norton, 15 Wall. 427, 21 L. Ed. 177; County of Greene v. Daniel, 102 U. S. 187, 26 L. Ed. 99; Davenport v. County of Dodge, 105 U. S. 237, 26 L. Ed. 1018; Rosenbaum v. Board (C. C.) 28 Fed. 223; U. S. ex rel. Reed v. Smallwood, 1 Chi. Leg. N. 321, Fed. Cas. No. 16,315.

Without considering, therefore, in what cases, or to what extent, a review of the decision of the postmaster or of the Assistant Postmaster General, as respects the determination of the question of fact upon which the rating of postal matter depends, is either reviewable at all, or under a proceeding by mandamus (see Carrick v. Lamar, 116 U. S. 423, 6 Sup. Ct. 424, 29 L. Ed. 677), I must dismiss the application upon the ground first stated.[58]

[58] The following cases in this collection are cases of mandamus: State v. Justices, 15 Ga. 408 (1854); People ex rel. Sheppard v. Ill. State Board of Dental Examiners, 110 Ill. 180 (1884); Illinois State Board of Dental Examiners v. People, 123 Ill. 227, 13 N. E. 201 (1887); Harrison v. People, 222 Ill. 150, 78 N. E. 52 (1906); Ex parte Sparrow, 138 Pa. 116, 20 Atl. 711 (1890); Ayers v. Hatch, 175 Mass. 489, 56 N. E. 612 (1900); People ex rel. Greenwood v. Board of Supervisors Madison Co., 125 Ill. 334, 17 N. E. 802 (1888); Allbutt v. General Council, 23 Q. B. D. 400 (1889); Potts v. Breen, 167 Ill. 67, 47 N. E. 81, 39 L. R. A. 152, 59 Am. St. Rep. 262 (1897); People ex rel. Bush v. Collins, 7 Johns. (N. Y.) 549 (1811); Gage v. Censors, 63 N. H. 92, 56 Am. Rep. 492 (1884); People ex rel. Lodes v. Department of Health, 189 N. Y. 187, 82 N. E. 187, 13 L. R. A. (N. S.) 894 (1907); People ex rel. Fonda v. Morton, 148 N. Y. 156, 42 N. E. 538 (1896); U. S. ex rel. Roop v. Douglass, 19 D. C. 99 (1890); U. S. v. Black, 128 U. S. 40, 9 Sup. Ct. 12, 32 L. Ed. 354 (1888); U. S. v. Hitchcock, 190 U. S. 316, 23 Sup. Ct. 698, 47 L. Ed. 1074 (1903); People ex rel. Raster v. Healy, 230 Ill. 280, 82 N. E. 599, 15 L. R. A. (N. S.) 603 (1907); People ex rel. Post v. Healy, 231 Ill. 629, 83 N. E. 453 (1908).

SECTION 56.—CERTIORARI

The writ of certiorari is used for the purpose of bringing up for review:

1. The judgment of a court, where appeal or writ of error is not a matter of right, but the higher court directs the case to be certified to it by the lower court for review. So under section 6 of the federal Circuit Court of Appeals Act of March 3, 1891 (U. S. Comp. St. 1901, p. 549).

2. The conviction of an inferior court of criminal jurisdiction. See, e. g., Jackson v. People, 9 Mich. 111, 77 Am. Dec. 491 (1860), post, p. 475, and Schaezlein v. Cabaniss, 135 Cal. 466, 67 Pac. 755, 56 L. R. A. 733, 87 Am. St. Rep. 122 (1902), ante, p. 56.

3. The quasi judicial decisions of administrative authorities.

It is only the latter application which is to be here considered.

Hawkins, Pleas of the Crown, II, c. 27, one of the chief authorities for the writ, deals mainly with the second application.

The best account of the writ as an administrative law remedy is an article by Prof. F. J. Goodnow on the Writ of Certiorari in 6 Polit. Science Quarterly, p. 493.

SECTION 57.—SAME—AUTHORITIES AND ACTIONS SUBJECT TO WRIT

BALL v. PATTRIDGE.[59]

(Court of King's Bench, 1666. 1 Sid. 296.)

By statute Car. II it is enacted that there shall be certain Commissioners who shall have power to receive claims concerning the fens in Cambridge, Huntington, etc., and to decide the boundaries of them, and that they shall make decrees and return them in the petty bag in chancery. And motions were made several times for certiorari to remove the proceedings before the commissioners, and some were granted. But afterwards, on consideration of the statute, they resolve that no certiorari will lie. And if there shall be any [writ], it shall be procedendo, for (by THE COURT) this is a new judicature absolute in the commissioners by this new law, with which this court has nothing to do if they proceed according to the statute, for then it binds perpetually, but if they do not proceed according to statute then all is void and coram non judice, and the parties are at liberty to examine this in an action brought at common law.

[59] The original report is in Norman French.

REX v. INHABITANTS IN GLAMORGANSHIRE.

(Court of King's Bench, 1700. 1 Ld. Raym. 580.)

Orders were made by the justices of peace, for levying money, for repairing Caerdiffe bridge, by virtue of the 23 Eliz. c. 11. And it was objected by Mr. Earle and Mr. Lechmore, that this court cannot in this case grant a certiorari; because it was a new jurisdiction erected by a new act of Parliament, the trust of the execution of which is reposed in the justices, and this court has nothing to intermeddle with it; for if they proceed according to the statute, then there is no reason to remove their orders; but if not, then what they do is coram non judice, and void. And the parties may examine the legality of their proceedings in an action; and so it was held in a case of decrees made by commissioners upon the act for the fens. 1. Sid. 296, Ball v. Partridge; Hardr. 480, Terry v. Huntington; Cro. Car. 394, Nichols v. Walker. And no certiorari lies to remove orders made by commissioners of bankrupts.

Sed non allocatur. For this court will examine the proceedings of all jurisdictions erected by act of Parliament. And if they, under pretence of such act, proceed to incroach jurisdiction to themselves greater than the act warrants, this court will send a certiorari to them, to have their proceedings returned here; to the end that this court may see, that they keep themselves within their jurisdiction; and if they exceed it, to restrain them. And the examination of such matters is more proper for this court. As in the case in question; whether the act of Queen Elizabeth impowers the justices to raise money to mend wears, and to determine the doubt upon the act. As to the cases of orders made by commissioners of sewers, and of the fens, the court is cautious in granting certioraris; and first they make inquiry into the nature of the fact, and what will be the consequence of granting the writ; because the country may be drowned in the mean time, whilst the commissioners are suspended by the certiorari. But that is only a discretionary execution of the power of the court. And as the commissioners of bankrupts he said, that they had only an authority, and not a jurisdiction. * * *

Then exception was taken to the orders, that the money ordered to be levied was for repairing the wears, to do which they had no jurisdiction, but only to raise money for the repair of the bridge; and their authority being special, they ought to confine themselves within it. But HOLT, Chief Justice, held that, in regard that at the time of the making of the act, these wears were built as necessary to support the bridge, by virtue of the powers given by the act of the queen for rebuilding of the bridge, and were esteemed so then and ever since, this court will esteem them accordingly still; and

therefore consequential to the power for rebuilding and repairing of the bridge, and especially when they are averred to be so in the orders. And GOULD and TURTON, Justices, agreed. * * *[60]

TREASURER OF CITY OF CAMDEN v. MULFORD.

(Supreme Court of New Jersey, 1856. 26 N. J. Law, 49.)

The CHIEF JUSTICE delivered the opinion of the court.[61]

This action is brought by the treasurer of the city of Camden to recover of the defendant the expenses of paving Pine street, in said city in front of the premises of the defendant. * * *

Whether the ordinances of a municipal corporation are subject to removal and review by writ of certiorari has recently been questioned by high judicial authority; and although the point was not mooted upon the argument of this case, its importance demands consideration. In the case of People v. Mayor, etc., of New York, 2 Hill (N. Y.) 11, Mr. Justice Bronson, in delivering the opinion of the court said: "The powers exercised by the common council of the city of New York are for the most part either legislative, executive, or judicial, and a certiorari only lies to inferior courts and officers who exercise judicial powers. If it were not for a few modern cases, I should be of opinion that we have no authority to supervise in this way the acts, ordinances, and proceedings of the corporation of the city of New York, or, indeed, of any other corporation, public or private. * * * All our city and many of our village corporations have been vested with very large powers within their respective limits; and, if a certiorari will lie to remove into this court an ordinance for constructing a sewer, it is difficult to see where we can stop short of reviewing all their acts in the same way, which looks to me like a great stretch of jurisdiction." In the Matter of Mt. Morris Square, 2 Hill (N. Y.) 14, it was held by the same learned court (Mr. Justice Cowen delivering the opinion) that the acts of municipal corporations, if plainly judicial in their character, may be reviewed on certiorari. But he said a certiorari to reverse a mere corporate act is without precedent, though if it should be altogether

[60] Only a portion of this case is printed.

"There was a mistake made by the commissioners of sewers, grounded upon this: that where St. 23 Hen. VIII, c. 5, says that the commissioners in several cases there mentioned shall certify their proceedings into chancery, afterwards by St. 13 Eliz. c. 9. it is enacted that thereafter the commissioners shall not be compelled to certify or return their proceedings, which they interpreted to extend to a certiorari; and thereupon they refused to obey the certiorari, but they were all committed; and yet the statute does not give authority to this court [King's Bench] to grant a certiorari, but it is by the common law that this court will examine, if other courts exceed their jurisdictions." Groenvelt v. Burwell, 1 Ld. Raym. 454, 469 (1699).

[61] Only a portion of the opinion is printed.

destitute of authority, and followed by a judicial decision, which would therefore be void for want of jurisdiction, the corporate act might be examinable on certiorari, as incidentally vitiating the latter.

The effect of the principle thus stated would seem to be that if a city ordinance directs a sewer to be built and a street to be paved, and provides that the expenses of the improvement shall be assessed upon persons benefited, the assessment, being of a judicial character, may be reviewed on certiorari, and the validity of the ordinance thus incidentally drawn in question. But if the ordinance directs not only that the improvement shall be made, but that the expenses shall be borne by the landholders by or over whose property it may pass, the party aggrieved is not entitled to protection by the writ of certiorari. Whatever may be the rule upon this subject adopted in other states, it is certain that the remedy by certiorari in this state is more extensive and efficacious, and rests upon broader, and, as we apprehend, upon more reasonable, ground. * * *

Thus it is habitually used as a remedy against unlawful taxation, either for state, county, township, or city purposes; and while the remedy has been denied in other states, as dangerous or prejudicial to the public welfare, no such evil has been experienced from the use of the remedy, while it has been found eminently salutary and efficacious as a protection to private rights against oppressive and illegal taxation. * * *

One of the most familiar uses of the writ is to test the validity of the proceedings of surveyors and freeholders in laying out and confirming of public highways, though, according to some of the authorities, the laying out of streets and highways is the mere exercise of municipal or corporate power, without the semblance of judicial decision. * * *

In the courts of New York and Massachusetts it seems to be well settled that the certiorari lies only to examine the validity of such ordinances of a municipal corporation as are of a judicial character, not such as are legislative or ministerial in their nature. * * *

But as to what constitutes a judicial act the authorities are by no means agreed. The Supreme Court of New York have repeatedly held that an ordinance directing a sewer to be built is not a judicial, but a ministerial, act. In re Mt. Morris Square, 2 Hill 21; People v. Mayor, etc., of City of New York, 5 Barb. 43; People v. Mayor, etc., of City of Brooklyn, 9 Barb. 533. And this seems to be the opinion of Mr. Justice Vredenburgh, in State v. Newark, 25 N. J. Law, 426. But in Rochester White Lead Co. v. City of Rochester, 3 N. Y. (N. Y.) 467, 53 Am. Dec. 316, Mr. Justice Taylor, in delivering the opinion of the Court of Appeals, said the charter of the city of Rochester confers upon the common council power to cause common sewers, drains, vaults, and bridges to be made in any part of the city. The ordinance of the common council directing such public improvement is judicial in its nature, and extends immunity

from private action for damages to those who perform the duty. In Parks v. Boston, 8 Pick. 218, 19 Am. Dec. 322, the Supreme Court of Massachusetts held that the power vested in the mayor and aldermen of Boston, as to laying out or altering streets, whenever, in their opinion, the safety or convenience of the inhabitants shall require it, is judicial in its character.[62] But this is questioned and pronounced anomalous by Mr. Justice Cowen in Re Mt. Morris Square, 2 Hill 22.

The true principle seems to be that ordinances directing the mere repairing or repaving of streets or reconstructing of sewers or bridges, which are enjoined upon municipal corporations as matters of duty, are purely ministerial, but that ordinances directing new streets to be opened or altered, new sewers to be constructed, or other similar public improvements to be made, by which the property of individuals is taken or affected, are in their nature judicial. So where a municipal corporation is authorized by ordinance to require the paving of streets, not as a matter of ordinary repair, but upon specified conditions only, and to impose the burthen not upon the city treasury, but upon a specific class of individuals, the ordinance is in its nature judicial. These powers and duties are in their character very similar, and in many particulars identical with those imposed by the act of Parliament (21 Hen. VIII, c. 5) upon the commissioners of sewers in England. The orders of these commissioners have always been held to be judicial in their character, and subject to review by certiorari. * * *[63]

DRAINAGE COM'RS v. GRIFFIN.

(Supreme Court of Illinois, 1890. 134 Ill. 330, 25 N. E. 995.)

BAILEY, J.[64] This was a common-law writ of certiorari, brought to review certain proceedings of the commissioners of the Mason & Tazewell Special Drainage District. * * * Said proceedings resulted in an order by said commissioners enlarging the boundaries of said district in accordance with the prayer of the petition. Various of the owners of the land thus annexed presented to the circuit court of Tazewell county their petition for a certiorari, alleging, among other things, that the proceedings by which the boundaries of said district had been enlarged were irregular, and without juris-

[62] In this case the writ of certiorari was allowed.

[63] Certiorari allowed to review action in laying out highways in Commissioners of Highways v. Harper, 38 Ill. 103 (1865); People v. Brighton, 20 Mich. 57 (1870); Boston & Maine R. R. v. Folsom, 46 N. H. 64 (1865); State v. Fond du Lac, 42 Wis. 287 (1877).

Certiorari not allowed to review tax proceedings in Michigan. Whitbeck v. Hudson, 50 Mich. 86, 14 N. W. 708 (1880).

[64] Only a portion of the opinion of Bailey, J., is printed.

diction or lawful authority on the part of said commissioners, and praying that the record of said proceedings be brought before said court, and that said order of annexation to or extension of the boundaries of said special drainage district, and the entry thereof in the records of said district, be reversed, set aside, and annulled. On said petition a writ of certiorari was duly issued and served, and thereupon said commissioners made return to said writ by certifying to said court the record of said proceedings. On inspection of said record, the court entered judgment quashing the same, and ordering that it be forever held for naught. Said judgment was affirmed by the Appellate Court (28 Ill. App. 561), and an appeal has now been taken to this court. * * *

It is strenuously urged that certiorari is not the proper remedy, the contention being that the petitioners should have resorted to an information in the nature of a quo warranto. We need not pause to determine whether quo warranto would lie or not, as we know of no rule which, in this case, would make that remedy necessarily exclusive, even if it should be held to be a proper or available remedy. The only question is whether the alleged defects in the proceedings for the enlargement of the drainage district are such as can be reached and remedied by writ of certiorari, and this question is in no way dependent upon whether a writ of quo warranto might not also lie to oust the drainage commissioners of their control over the territory annexed, or to dissolve the organization of the drainage district so far as it applies to that territory. The writ of certiorari is a well-known common-law writ, and in England the court of King's Bench has always been in the practice of awarding it to inferior jurisdictions, commanding them to send up their records for inspection. By adopting the common law, we have adopted this as a recognized legal remedy, and in this state any court exercising general, common-law jurisdiction has, unless expressly forbidden to do so by the statute, an inherent authority to issue it. People v. Wilkinson, 13 Ill. 660; Miller v. Trustees, 88 Ill. 26; 3 Am. & Eng. Enc. Law, tit. "Certiorari." Neither in England nor in this state is it held to be a writ of right, but it issues, in proper cases, only upon application to the court, on proper cause shown.

We have repeatedly held that said writ may be awarded to all inferior tribunals and jurisdictions where it appears that they have exceeded the limits of their jurisdictions, or in cases where they have proceeded illegally, and no appeal is allowed, and no other mode is provided for reviewing their proceedings. Gerdes v. Champion, 108 Ill. 137; Doolittle v. Railroad Co., 14 Ill. 381; Railroad Co. v. Whipple, 22 Ill. 105; Railroad Co. v. Fell, 22 Ill. 333. The purpose of the writ is to have the entire record of the inferior tribunal brought before the superior court to determine whether the former had jurisdiction, or had exceeded its jurisdiction, or had failed to proceed according to the essential requirements of the law. The

trial is solely by inspection of the record, no inquiry as to any matter not appearing by the record being permissible, and, if the want of jurisdiction or illegality appears by the record, the proper judgment is that the record be quashed.

Undoubtedly, where the controversy involves the investigation of facts not appearing upon the record, certiorari is not the proper remedy. Thus, if in the present case the right to have the proceedings by which the lands in question were annexed to the drainage district set aside, and the drainage commissioners ousted of the corporate authority they now claim to exercise over said lands, depended upon facts which could be established only by evidence de hors the record, the writ of certiorari would manifestly be of no avail. It may be admitted that in such case quo warranto would be the exclusive remedy. But here the want of jurisdiction, if it exists at all, appears upon the face of the record. If, then, the proceedings of the drainage commissioners enlarging the boundaries of the district constitute a subject-matter which may be reviewed by certiorari, that must be held to be an appropriate remedy.

The general rule seems to be that this writ lies only to inferior tribunals and officers exercising judicial functions, and the act to be reviewed must be judicial in its nature, and not ministerial or legislative. Locke v. Lexington, 122 Mass. 290; State v. Mayor, 34 Minn. 250, 25 N. W. 449; In re Wilson, 32 Minn. 145, 19 N. W. 723; Robinson v. Supervisors, 16 Cal. 208; Ex parte Fay, 15 Pick. (Mass.) 243; Stone v. Mayor, etc., 25 Wend. (N. Y.) 157; Esmeralda Co. v. District Court, 18 Nev. 438, 5 Pac. 64; Thompson v. Multnomah Co., 2 Or. 34. But it is not essential that the proceedings should be strictly and technically "judicial," in the sense in which that word is used, when applied to courts of justice. It is sufficient if they are what is sometimes termed "quasi judicial." The body or officers acting need not constitute a court of justice in the ordinary sense. If they are invested by the legislature with the power to decide on the property rights of others, they act judicially in making their decision, whatever may be their public character. Robinson v. Supervisors, supra.

Thus it is held that this writ lies to review the proceedings of supervisors, commissioners, city councils, etc., in opening, altering, or discontinuing public streets and highways as to their legality, or regularity, though not as to the question of the expediency of such improvements. 3 Am. & Eng. Enc. Law, 65, and authorities cited in note 4. So, also, in some states, it has been held, subject to the foregoing qualification, to be the proper writ to correct illegalities in the levying of taxes and local assessments by assessors, commissioners, etc. (Id.), though in this state it has been refused where the defense of illegality could be made at the hearing of the application for judgment (Pease v. City of Chicago, 21 Ill. 500). The writ has also been held to lie to review the action of school trustees in uniting

and in dividing school districts (Miller v. Trustees, 88 Ill. 26; State v. Whitford, 54 Wis. 150, 11 N. W. 424); or of a town board in removing an assessor (Merrick v. Town of Arbela, 41 Mich. 630, 2 N. W. 922); or of a city council in removing a city officer (Mayor v. Shaw, 16 Ga. 172); or of a city council in granting a ferry license (Ex parte Fay, 15 Pick. [Mass.] 243); or of a board of supervisors in ordering an election to relocate a county seat (Herrick v. Carpenter, 54 Iowa, 340, 6 N. W. 574); or of a board of supervisors in creating the office of clerk of said board, and raising certain salaries which had been fixed by statute (Robinson v. Supervisors, 16 Cal. 208). The foregoing are a few of the many cases where this writ has been held to lie, and sufficiently illustrate the rules above stated.

The proceedings by which the boundaries of the drainage district in question were enlarged by the drainage commissioners were, at least in most of their important features, judicial in their character. The commissioners were required to ascertain and determine from evidence whether the requisite number of the adult owners of land in the district had signed the petition for the annexation of the adjoining lands, and whether the signers were the owners of the requisite proportion of the lands embraced within the district. They were also required to ascertain and determine from evidence whether the lands sought to be annexed to the district were involved in the same system of drainage, and required for outlets the drains of the district. When these facts were determined judicially, and not till then, were the commissioners authorized by the statute to enter their order annexing said lands. From their decision no appeal was given, nor were any other means provided by the statute for reviewing their proceedings. In every point of view then the case comes within that class of cases where certiorari is an appropriate remedy.

But, as the appellants insist that a different rule has been announced by this court in various of its decisions, we will briefly consider the cases to which we are referred as sustaining that contention. Renwick v. Hall, 84 Ill. 162, Keigwin v. Commissioners, 115 Ill. 347, 5 N. E. 575, Evans v. Lewis, 121 Ill. 478, 13 N. E. 246, and Samuels v. Commissioners, 125 Ill. 536, 17 N. E. 829, were all cases in chancery, and it was held that there was no jurisdiction in a court of equity, for the reason that there was a complete and adequate remedy at law, and that the legal existence of the several corporations involved in those cases could be determined by an information in the nature of a quo warranto. Trumbo v. People, 75 Ill. 561, People v. Newberry, 87 Ill. 41, Osborn v. People, 103 Ill. 224, and Blake v. People, 109 Ill. 504, were proceedings for the collection of either school taxes or special assessments, and the principle decided in those cases was that the various school districts and drainage districts in question in those several suits were at least corporations de facto, and that the legality of the organization

of a corporation could not be attacked collaterally. Alderman v. Directors, 91 Ill. 179, was trespass, and the plaintiffs were directors of a de facto district; and the same rule was there declared. In Hinze v. People, 92 Ill. 406, it was held that quo warranto would lie against persons who assume to hold offices supposed to be created by a law claimed to be invalid by reason of being in contravention of the Constitution; and in People v. Board, 101 Ill. 308, 40 Am. Rep. 196, it was held that quo warranto also lies against a corporation which undertakes to exercise powers which it does not possess.

There is nothing decided in any of these cases which shows or tends to show the validity of either of the propositions insisted upon by the appellants in this case. All that is determined by those cases may be admitted, and yet non constat that the common-law writ of certiorari does not lie in the present suit. No doubt some expressions were used in the opinions of several of those cases from which it might be inferred that an information in the nature of a quo warranto was the only mode of testing the legality of the formation of an existing de facto corporation, but that question did not arise and was not decided in those cases.

However, in the case of Lees v. Commissioners, 125 Ill. 47, 16 N. E. 915, it was expressly held that the common-law writ of certiorari cannot be resorted to for the purpose of determining whether a corporation has a legal existence, and that the validity of its organization can be questioned only by quo warranto. But there is this marked distinction between that case and this: There the corporate existence itself of a quasi municipal body was sought to be challenged by certiorari, while here such existence is fully admitted, and the only thing sought to be done is to call in question the validity of an order of a municipal body admitted to be a corporation both de facto and de jure, extending the boundaries of the drainage district. It seems eminently proper, and in consonance alike with the intention of the statute and the rules and analogies of the common law, that a proceeding, the object of which is to forfeit or destroy that corporate life which emanates solely from the sovereign power of the state, should be instituted by the attorney general or state's attorney of the proper county. It is said, in section 778, Ang. & A. Corp., citing in that behalf Rex v. Pasmore, 3 Term R. 244, 245, and Regents, etc., v. Williams, 9 Gill & J. (Md.) 365, 31 Am. Dec. 72, that "a quo warranto is necessary where there is a body corporate de facto, who take upon themselves to act as a body corporate, but, from some defect in their constitution, cannot legally exercise the powers they affect to use." It appears, however, from the same section, and from the authorities there cited, that where there is a legally existing corporation, capable of acting, which has been guilty of an abuse of power, or of its franchises, then, not only will an information in the nature of a quo warranto lie, but scire facias as well.

Nor do we perceive any good reason why a municipal body, which has exceeded its jurisdiction and has proceeded illegally, may not, on sound legal principles, be proceeded against by quo warranto, by scire facias, or by the common-law writ of certiorari, indifferently, as the one or the other may afford a proper and sufficient remedy. All of these several writs are direct remedies afforded by the law, and, in respect to neither of them, can it be said that it is a collateral attack upon the legal existence or organization of the corporation. As has already been suggested, this court has expressly held, in Miller v. Trustees, 88 Ill. 26, that the common-law writ of certiorari was an appropriate remedy to bring before the circuit court for review the proceedings of a board of trustees of schools consolidating two school-districts into one; and that seems to be going quite as far, if not further, than is demanded by the requirements of the present case. * * * [65]

ATTORNEY GENERAL v. MAYOR AND ALDERMEN OF NORTHAMPTON.

(Supreme Judicial Court of Massachusetts, 1887. 143 Mass. 589, 10 N. E. 450.)

Petition, filed April 12, 1886, by the Attorney General, at the relation of the civil service commissioners of the commonwealth, appointed under St. 1884, c. 320, for a writ of certiorari to quash the proceedings of the respondents in the matter of the appointment of a police officer of Northampton, said appointment being alleged to be in violation of the rules prepared by said commissioners. The case was heard by W. Allen, J., and reserved for the consideration of the full court.

MORTON, C. J. We are of opinion that the petitioner has mistaken his remedy in this case. As was stated by Chief Justice Gray in Locke v. Selectmen of Lexington, 122 Mass. 290, "a writ of certiorari lies only to correct the errors and restrain the excesses of jurisdiction of inferior courts or officers acting judicially." It lies to correct the errors of inferior courts, or judicial officers, acting in proceedings not according to the course of the common law, and where errors cannot be corrected by appeal, or exceptions, or by a writ of error. Lynch v. Crosby, 134 Mass. 313.

Thus, it is the proper remedy to revise the proceedings of county commissioners, or of city councils, or of boards of aldermen, when they act in matters like the laying out of highways, or making assessments for sewers or other improvements. The reason is that, in such matters, they act judicially, and not merely as ministerial

[65] See Kinsloe v. Pogue, 213 Ill. 302, 72 N. E. 906 (1904), removal of county seat; Moore v. City Council of Perry, 119 Iowa, 423, 93 N. W. 510 (1903).

or executive officers. Parks v. Boston, 8 Pick. 218, 19 Am. Dec. 322; Fay, Petitioner, 15 Pick. 243; Robbins v. Lexington, 8 Cush. 292; Dwight v. City Council of Springfield, 4 Gray, 107; Lowell v. County Commissioners, 6 Allen, 131; Farmington River Water Power Co. v. County Commissioners, 112 Mass. 206; Powers v. City Council of Springfield, 116 Mass. 84; Snow v. Fitchburg, 136 Mass. 179. Numerous other cases might be cited, and they all go to show that the uniform rule in this commonwealth is, as we have stated above, that certiorari will only lie to revise the proceedings of tribunals or officers acting in a judicial capacity.

The appointment of police officers by the municipal authorities of a city cannot in any just sense be called a judicial proceeding. It is an important duty, and, like most administrative duties, involves the exercise of judgment and discretion; but it is administrative, and not judicial, in its character. No one has the right to be heard, and their decision is not, within the meaning of the law, an adjudication or judicial determination of any question or of the rights of any parties. Opinion of Justices, 138 Mass. 601.

We are therefore of opinion that certiorari is not the proper remedy. In this proceeding, it would not be in our power to afford the redress which the petitioner asks.

Petition dismissed.[66]

[66] Accord: People ex rel. McDonald v. Bush, 40 Cal. 344 (1870). But see Wildy v. Washburn (N. Y.) 16 Johns. 49 (1819).

Compare People ex rel. Mack v. Burt, 170 N. Y. 620, 63 N. E. 1121 (1902), affirming without opinion 72 N. Y. Supp. 567 (1901), holding action of civil service commissioners in classifying or not classifying places in the civil service to be administrative and not reviewable by certiorari, with People ex rel. Sims v. Collier, 175 N. Y. 196, 67 N. E. 309 (1903), holding action in rating position as competitive or noncompetitive to be judicial, and not controllable by mandamus. In the latter case the court says: "That such decisions are reviewable by the courts must be regarded as settled, for the question whether competitive examinations for appointment to particular places are practicable or not has been held to be a question of law, to be decided in the light of the facts and the evidence bearing upon the subject."

"The board of health did act, and had a right to act, upon its own inspection and knowledge of the alleged nuisance. It was not obliged to hear any party. It could obtain its information from any source and in any way, and hence its determination upon the question of nuisance is not reviewable by certiorari." People ex rel. Copcutt v. Board of Health of City of Yonkers, 140 N. Y. 1, 10, 35 N. E. 320, 323, 23 L. R. A. 481, 37 Am. St. Rep. 522 (1893).

So, also, Hartman v. Wilmington, 1 Marv. (Del.) 215, 41 Atl. 74 (1894).

Selection of site for institution illegally delegated to committee of supervisors not reviewable on certiorari. People v. Supervisors of St. Lawrence Co., 25 Hun (N. Y.) 131 (1881).

Certiorari to review action of railroad commission, see People ex rel. Loughran v. Railroad Commissioners, 158 N. Y. 421, 53 N. E. 163 (1899), consent to discontinuance of station; People ex rel. Steward v. Board of Railroad Commissioners, 160 N. Y. 202, 54 N. E. 697 (1899), consent to building railroad.

SECTION 58.—SAME—SCOPE OF REVIEW; WHAT KINDS OF ERROR CORRECTED

JACKSON v. PEOPLE.

(Supreme Court of Michigan, 1860. 9 Mich. 111, 77 Am. Dec. 491.)

Certiorari to the recorder's court of the city of Detroit, where Jackson was convicted on a complaint for obstructing an alley in said city. * * *

CAMPBELL, J.[67] The first question which arises is, how far are we at liberty to look into the proceedings returned by the recorder's court, to ascertain whether the recorder erred in any respect within our supervisory control?

It is claimed on behalf of the people that, upon a certiorari at common law, the only thing to be determined is whether the court below had jurisdiction, and that if jurisdiction existed the discretionary power of the court cannot be inquired into. And it is further claimed that the jurisdiction depends upon the subject-matter of the complaint. Applying this rule to the case before us, it is insisted that the recorder's court has jurisdiction of all complaints for obstructing alleys, and that, this jurisdiction being called into exercise by such a complaint, its proceedings thenceforth are not examinable unless an unauthorized judgment is given beyond the one allowed by law. As the same immunity from review applies to all special tribunals not acting according to the course of the common law, it becomes very important to ascertain how far this doctrine is correct; for, if true, it certainly gives them an extent of authority over persons and property not possessed by any of the higher courts.

There are certain classes of questions which, by the common understanding from time immemorial, belong to the course of judicial inquiry under the laws of the land. The common law, and the various charters and bills of rights, recognized and assured the right to such an inquiry. And the Constitution of this state, in apportioning the judicial power, as well as in affirming the immunity of life, liberty and property, has always been understood to guarantee to each citizen the right to have his title to property and other legal privileges determined by the general tribunals of the state. These municipal courts, so far as they act under city by-laws, are not designed to decide between man and man, or to administer general laws. They are ordained to prevent disorder in matters of local convenience, and to regulate the use of public and quasi public easements so as to prevent confusion. If, in exercising this power,

[67] Only a portion of this case is printed.

they can incidentally decide upon the rights of private property, so as to determine its enjoyment without review, there would seem to be a practical annihilation of the right to resort to the general tribunals and the common law. The consequences of such a doctrine, whether correct or incorrect, are serious enough to render it our duty to examine very carefully into its foundations.

The power of reviewing upon certiorari judicial proceedings of inferior tribunals and bodies not according to the course of the common law has long been exercised in England, as well as in this country. The power has been jealously maintained, and has been deemed necessary to prevent oppression. It must be apparent to any one that if the superior court could only examine into the right of the inferior one to enter upon an inquiry, without reference to the manner in which that inquiry is conducted, this remedy would be of small account.

In New York, a series of decisions have appeared from time to time, asserting that when certiorari is given by statute it lies to correct any legal mistakes, but where issued as at common law it can only review the jurisdiction of the court below. It is unnecessary to refer particularly to these authorities, inasmuch as in Morewood v. Hollister, 6 N. Y. 309, this distinction seems to be regarded as unfounded, and the office of the writ is considered as reaching all errors of law. We have examined with much care all the English authorities within reach bearing upon this subject, and have found nothing whatever to give color to such a distinction. There are, indeed, cases where a certiorari lies to examine errors generally, and others where it lies only to inquire into the jurisdiction; but the distinction arises out of very different considerations. This will appear by reference to some of the cases in which questions of jurisdiction have been reviewed.

There are many statutes in England which, not only in large classes of summary convictions, but also in special proceedings for condemning lands, and for other purposes, take away, in express terms or by acknowledged implication, the right to a certiorari, which otherwise existed. In some cases an appeal lies to review the whole proceeding; in others, it is subject to no further examination on the merits. In all these cases it is held that a statute taking away the right to a certiorari does not deprive the aggrieved party of the right to sue out such a writ where the proceeding has been without jurisdiction. And the want of jurisdiction, when arising from matters not appearing in any way on the proceedings, may even be shown aliunde by the affidavits. 8 Ad. & El. 413; 11 Ad. & El. 194; 5 B. & C. 816; 10 B. & C. 477; 5 Ad. & El. 626; 2 Man. & Ry. 397; 13 Q. B. 988; 15 Q. B. 121. * * *

If certiorari will lie for want of jurisdiction in cases where the common-law remedy of certiorari, in its usual acceptation, is expressly or confessedly taken away, it follows as an unavoidable conclu-

sion that the usual office of the common-law writ is to inquire into something more than jurisdiction. This may be made more plain by examining what is required to be returned.

It was held in Rex v. Killett, 4 Burr. 2063, that it is necessary to set out the evidence upon a conviction, that the court may judge whether the justices have done right.[68] And in Rex v. Read, 2 Doug. 486, it was held that a conviction is bad unless it does set forth the evidence. The same doctrine is laid down in Rex v. Clarke, 8 T. R. 220; Rex v. Smith, 8 T. R. 588; Regina v. Tuck, 10 Q. B. 540. And where the evidence set out is not sufficient to justify a conviction, or other judicial act complained of, it will be quashed on certiorari. 8 T. R. 588; 3 B. & Ald. 596; 2 Chit. 578; Cowp. 728; 2 B. & Ald. 378; 6 T. R. 177; 4 Ad. & El. 216; 4 Ad. & El. 205; 3 Q. B. 790.

The office of a certiorari is not, however, to review questions of fact, but questions of law. And in examining into the evidence the appellate court does so, not to determine whether the probabilities preponderate one way or the other, but simply to determine whether the evidence is such that it will justify the finding as a legitimate inference from the facts proved, whether that inference would or would not have been drawn by the appellate tribunal. It is said in The King v. Daman, 2 B. & Ald. 378, that "all the facts necessary to subject the party to the penalty imposed by the act of Parliament must appear upon the information, and be established by proof." And in The King v. Davis, 6 T. R. 177, it is said: "It is sufficient in convictions if there were such evidence before the magistrates as in an action would be sufficient to be left to a jury." The same principles are recognized in the other cases above cited; also in Rex v. Glossop, 4 B. & Ald. 616, and Regina v. Bolton, 1 Q. B. 67.

Where facts exist which, if apparent, would have ousted the jurisdiction, they have been allowed to be set forth in the affidavits of the relator, and a response required. Instances of this occur where the magistrate acting was disqualified by interest or other similar cause. 1 Q. B. 67; 1 Q. B. 467; 6 Q. B. 753. And in Regina v. Gillyard, 12 Q. B. 527, a conviction was quashed, although perfectly regular, because it was made to appear that it was obtained fraudulently.

The same principles which require a conviction to be quashed when upon the facts and the law applicable to them the case is insufficient to justify it would seem to require that rulings of law upon the admission or exclusion of evidence should be reviewed. And such we find to have been the practice. In the case of Regina v. Cheltenham Com'rs, 1 Q. B. 467, the rate complained of was

[68] The case adds: "But upon an order it is not necessary, because the court will presume that they have done right."

quashed because certain interested magistrates voted upon the admission of evidence, the court holding this a decision which might have had an important influence upon the result, and therefore sufficient to avoid the whole action, whether the interested magistrates took any further part or not. And in this case the statute had expressly taken away the writ of certiorari; and it was issued, and the case decided, on the ground that the question from its bearing became one of jurisdiction. And in Regina v. Justices of Hertfordshire, 6 Q. B. 754, the proceedings were quashed because an interested magistrate had sat during a portion of them, although he withdrew before they were completed. The questions of law arising either upon the admission of evidence, or the other rulings in the proceedings, must always have a bearing on the result, and the appellate court cannot, generally, at least, assume that any of them have not contributed to it. In Regina v. Justices of Staffordshire, 30 Eng. L. & Eq. 402, where certiorari was expressly taken away by statute, a writ was allowed, and a conviction under a local by-law quashed, because the justices had ruled that an approval of the by-law by the Secretary of State made it binding, and therefore refused to consider its validity. The Court of Queen's Bench held the by-law invalid, and so quashed the conviction.

We are therefore of opinion that the return to the certiorari is all properly before us, and that the law contemplates that it shall be full, both upon the evidence and upon the decisions and rulings. * * *[69]

PEOPLE ex rel. CITIZENS' GAS LIGHT CO. OF BROOKLYN v. BOARD OF ASSESSORS OF CITY OF BROOKLYN.

(Court of Appeals of New York, 1868. 39 N. Y. 81.)

MASON, J.[70] * * * The office of this writ of certiorari, when issued out of the Supreme Court to review the proceedings and determination of inferior tribunals, has fixed limits that may be regarded as settled by the adjudged cases in this state, although it must be conceded that there is great conflict in the decisions when we get beyond a certain point in the functions of the writ. I think we may safely say that the following rule may be deduced from adjudged cases in this state, viz.: That its office extends, unquestionably, to the review of all questions of jurisdiction, power and authority of the inferior tribunal to do the acts complained of, and all questions of regularity in the proceedings; that is, all questions whether the inferior tribunal has kept within the boundaries pre-

[69] That a provision taking away certiorari does not apply where there is a clear absence of jurisdiction, see Ex parte Bradlaugh, 3 Q. B. D. 509 (1878).

[70] Only a portion of the opinion of Mason, J., is printed.

scribed for it by the express terms of the statute law or by well-settled principles of the common law. * * *

I cannot assent to the proposition that when the Supreme Court have issued the writ, heard the case upon the return, and have committed a plain error in law, and have come to the conclusion, erroneously, as in this case, that the assessors have kept within the boundaries prescribed by the statutes, and therefore hold that the relators can take nothing by the writ, and give judgment quashing the writ—that such judgment is not subject to review in this court. The judgment of the Supreme Court, in such a case, is not rendered upon the ground that the proceedings ought not to be reviewed by the writ, or that it was improvidently issued, but upon the ground that the allegations of error have not been sustained in the given case. Since the decision of the several suits growing out of the tax assessments in the city of Poughkeepsie,[71] there is no redress to the citizen against illegal assessments like this, if it is not afforded upon this common-law writ of certiorari, which it certainly can be, so far as to require the assessors to keep within the rules of law, and comply with terms prescribed by the statute. * * *[72]

PEOPLE ex rel. BODINE v. GOODWIN et al.

(Court of Appeals of New York, 1851. 5 N. Y. 568.)

RUGGLES, C. J.[73] Neither the commissioners of highways, nor the referees on appeal from their decision, have power to lay out a road public or private through any building without the consent of the owner. 1 Rev. St. p. 502, § 3, and page 513, § 57. There was a barn standing on the land laid out for the highway in controversy; and unless the owner's consent was given that the highway should be so laid out, the referees in laying it out acted without authority, and their proceedings were void for want of jurisdiction. Clark v. Phelps, 4 Cow. 190. Inferior magistrates, when required by writ of certiorari to return their proceedings, must show affirmatively that they had authority to act; and where, as in the present case, their authority and jurisdiction depend upon a fact to be proved before themselves, and such fact be disputed, the magistrate must certify the proofs in relation to it, for the purpose of enabling the higher court to determine whether the fact be established. The decision of the magistrate in relation to all other facts is final and conclu-

[71] See Foster v. Van Wyck, 2 Abb. Dec. (N. Y.) 167 (1867), denying remedy against the assessors and collector, and Swift v. Poughkeepsie, 37 N. Y. 511 (1867), denying remedy against the city on implied contract.

[72] See Milwaukee Iron Co. v. Schubel, 29 Wis. 444, 9 Am. Rep. 591 (1872).

[73] Only a portion of the opinion of Ruggles, C. J., is printed.

sive, and will not be reviewed on a common-law certiorari.[74] But the main object of this writ being to confine the action of inferior officers within the limits of these delegated powers, the reviewing court must necessarily re-examine, if required, the decision of the magistrate on all questions on which his jurisdiction depends, whether of law or of fact. The evidence, therefore, to prove the consent of the owner of the land to the laying out of the road, was properly stated on the return, and is properly examinable here. * * *[75]

PEOPLE ex rel. COOK v. BOARD OF POLICE OF METROPOLITAN POLICE DISTRICT OF STATE OF NEW YORK.

(Court of Appeals of New York, 1868. 39 N. Y. 506.)

Appeal from judgment of the Supreme Court in General Term of the First District, affirming a judgment of the Special Term on certiorari, by which a judgment or order of the appellants, imposing a fine upon the relator, was reversed and annulled.

The relator was a member of the police force of the Metropolitan police district, and patrolman of the Ninth precinct, and it appeared by the return, that, on the 19th of January, 1863, a charge of neglect of duty was preferred against him, the specification of which was absence from duty, and from the station house of the Ninth precinct, from October 26, 1861, to the 8th day of January, 1863—a period of 439 days. Upon this he was tried by the appellants, and, on the 14th of February, 1863, the judgment of the board was pronounced, whereby they find him guilty of the matters charged, and therefore order and adjudge that he be fined the amount of 439 days' pay, and that his pay for that number of days be, and the same is, hereby forfeited.

In obedience to the precept of the certiorari, the return of the appellants set out the charge, the notice thereof to the relator, and the requirement to appear and answer, and notice of the time and place of trial, the relator's written admission of due personal service upon him of the complaint, charges, specifications and notice of trial, and also the testimony and proofs taken on the trial, certain

[74] See, however, People v. Board of Police, 39 N. Y. 506 (1868), post, p. 480.

[75] Accord: Whitney v. Board of Delegates, 14 Cal. 479, 500 (1860); Stumpf v. Board of Sup'rs, 131 Cal. 364, 63 Pac. 663, 82 Am. St. Rep. 350 (1901); Stone v. Miller, 60 Iowa, 243, 14 N. W. 781 (1882).

Contra: Chicago & Rock Island R. Co. v. Whipple, 22 Ill. 105, 108 (1859): "It is not the practice to ascertain from extrinsic evidence whether the inferior court had jurisdiction or had proceeded according to law, but to determine these questions by the record." Whittaker v. Venice, 150 Ill. 195, 203, 37 N. E. 240 (1894).

of the rules and regulations of the appellants, with the finding and judgment of the appellants, convicting him of the charge, and imposing the fine. The case is certified to have closed on the 10th of February; the judgment was rendered on the 14th.

WOODRUFF, J.[76] The board of police for the Metropolitan district had jurisdiction of the subject-matter of the charge, of the charge itself, and of the person of the relator who appeared on the trial before them. It is not objected that the judgment is not such as, upon due conviction, they had authority to pronounce and carry into effect.

The question thereupon arises, which I think the principal question on this appeal, may the court, on a common-law certiorari, go beyond the inquiry whether the inferior tribunal had jurisdiction, and was the proceeding and judgment within that jurisdiction? Other questions, it is true, were raised and discussed; but, in the view that I take of the case, it will be unnecessary to consider them. Some of them, in my judgment, are mere questions of form or practice, which are clearly not open to review.

It is insisted that, on the trial, there was no evidence that the relator was guilty of the offense charged; that the actual facts were undisputed; that the alleged neglect of duty, and the only neglect of duty in any wise appearing, was his absence during the period of his dismissal from the force; and that it was error in law to hold that an offense, and convict and pronounce judgment thereupon.

If, as insisted by the appellants, the court cannot, on certiorari, look into the evidence, nor the rulings thereupon, with a view to the correction of errors in law committed on the trial, then the particular facts upon which the finding of guilty was based cannot be considered. Jurisdiction appearing, and the judgment being within that jurisdiction, the judgment is to be deemed, on this certiorari, conclusive. It has often been said that a common-law certiorari brings up the record only, and not the evidence, which forms no part of the record, and, if so, then the circumstance that, in the particular case, the inferior tribunal was required by the writ to return, and did return, the evidence, does not enlarge the field of review, or bring any other than jurisdictional questions under examination.

That this is the extent and limit of the review by a common-law certiorari was many times stated in the former Supreme Court, and has been often stated in the present Supreme Court. * * * It would be idle to attempt to harmonize the various decisions and dicta above referred to. * * *

It is true that the court in the later cases has taken a more liberal view of the office of a common-law certiorari, and the power of review thereby, than was expressed by the Supreme Court during many

[76] Only a portion of the opinion is printed.

years. * * * My own conviction of the importance of the question, in view of the great number of proceedings of a summary character in which powers are exercised which affect valuable rights both of person and property, has led me to collect and compare the more prominent cases on this subject; and I cannot resist the belief that a disposition has been manifested to limit the office of this most useful writ within too narrow limits.

Let it be once established that where an officer or board of officers have jurisdiction of the subject or of the persons to be affected, and proceed in its exercise according to the prescribed mode or forms, their determination is final and beyond the reach of any review, whatever errors in law they may commit, and however clear it may be upon undisputed facts that their judgment, decision or order is not warranted, and there is danger that much of injustice and wrong may happen without possibility of redress.

On the other hand, to hold that conclusions of fact upon conflicting evidence and matters of mere detail, in the order or mode of proceeding, not violating any rule of law to the prejudice of the party, and matters which are clearly submitted to the judgment or discretion of the inferior tribunal, where the evidence presents a case for its exercise, can be so reviewed, would be in conflict with all of the previous adjudications, and produce great inconvenience and embarrassment.

It may be desirable not to multiply cases in which the appellate courts can be called upon to interfere in matters of small importance, but that furnishes no reason for denying the power to see that the rules of law are not violated, when wrong is done, and no great public inconvenience will result from its exercise.

I conclude, therefore, that in the case before us the Supreme Court had power, and that on this appeal this court have power, to examine the case upon the whole of the evidence, to see whether, as a matter of law, there was any proof which could warrant a conviction of the relator, of the charge of neglect of duty, by absence from duty as a patrolman of the Ninth precinct, from the 26th of October, 1861, to the 8th of January, 1863.

If there was no evidence of neglect of duty—if the case was such at the close of the trial that it would have been erroneous to submit the question to the jury, were the like question before a jury in an ordinary action—then the error is an error in law, and the conviction was illegal. It rests upon no finding of facts upon evidence tending to sustain such finding; but as matter of law the relator was entitled to be acquitted of the charge. * * *[77]

[77] Accord: Milwaukee Iron Co. v. Schubel, 29 Wis 444, 9 Am. Rep. 591 (1872).

Arnoux, J., in Matter of Lauterjung, 48 N. Y. Super. Ct. 308. (1882), said: "Until the decision of the Court of Appeals in the year 1868, in the case of People ex rel. Cook v. Board of Police, 39 N. Y. 506 [in which Judge Arnoux was counsel for the relator], the tendency of the courts in certiorari cases was to refuse to examine into the evidence or to determine any ques-

NEW YORK CODE OF CIVIL PROCEDURE, §§ 2122, 2140, 2141.

Sec. 2122. Except as otherwise expressly prescribed by a statute, a writ of certiorari cannot be issued in either of the following cases:

1. To review a determination which does not finally determine the rights of the parties, with respect to the matter to be reviewed;

2. Where the determination can be adequately reviewed, by an appeal to a court or to some other body or officer;

3. Where the body or officer making the determination is expressly authorized by statute to rehear the matter, upon the relator's application; unless the determination to be reviewed was made upon a rehearing, or the time within which the relator can procure a rehearing has elapsed.

Sec. 2140. The questions, involving the merits, to be determined by the court upon the hearing, are the following, only:

1. Whether the body or officer had jurisdiction of the subject-matter of the determination under review;

2. Whether the authority, conferred upon the body or officer, in relation to that subject-matter, has been pursued in the mode required by law, in order to authorize it or him to make the determination;

3. Whether in making the determination, any rule of law, affecting the rights of the parties thereto, has been violated, to the prejudice of the relator;

4. Whether there was any competent proof of all the facts, necessary to be proved, in order to authorize the making of the determination;

5. If there was such proof, whether there was, upon all the evidence, such a preponderance of proof, against the existence of any of those facts, that the verdict of a jury, affirming the existence thereof, rendered in an action in the Supreme Court, triable by a jury, would be set aside by the court, as against the weight of evidence.

Sec. 2141. The court, upon the hearing, may make a final order, annulling or confirming, wholly or partly, or modifying, the determination reviewed, as to any or all of the parties.[78]

tion beyond that of jurisdiction. This permitted inferior tribunals and magistrates to exercise their powers in an arbitrary, high-handed and unjustifiable manner, and made them more absolute than any court of original jurisdiction. The case above cited brought to the attention of the court an illustration of the despotic action that such boards may take when beyond the reach of review. * * * There able counsel contended that the court was bound by the record. This question was examined with exhaustive research by that distinguished ornament of the bench, the late Judge Woodruff, and the able opinion that he wrote, unanimously concurred in by the other judges of the court, marks a new departure in the law relating to certiorari in this state."

[78] See People ex rel. McAleer v. French, 119 N. Y. 502, 507, 508, 23 N. E. 1061 (1890).

As to certiorari in connection with taxation, under statute, see People ex

DOLAN'S APPEAL.

(Supreme Court of Pennsylvania, 1885. 108 Pa. 564.)

This was an appeal and certiorari taken by James Dolan from an order of said court revoking a license duly granted to him to sell intoxicating liquors.

Mr. Justice STERRETT delivered the opinion of the court.

It appears from the docket entries of the court below that on March 10, 1884, James Dolan was licensed to keep a hotel, and on the 17th of the same month he was ruled "to show cause why the license granted to him should not be revoked." Service of the rule was duly accepted by his attorney, testimony was taken, and the case set down for argument. After several continuances, it was heard and held under advisement, and on May 27th the rule to show cause, etc., was made absolute. On the following day Dolan made affidavit, entered into recognizance with sureties, etc., and appealed from the order of court revoking his license. A few days thereafter a writ of certiorari, to remove the record, was received and filed. With the exception of the original petition for license, the foregoing is a correct summary of the facts exhibited by the record presented to us for review.

It is scarcely necessary to say that no appeal is given in such cases, and, if it were not for the fact that we may review the proceeding on the writ of certiorari, the case might be summarily disposed of by quashing the appeal.

In considering the case on the certiorari, we are necessarily restricted to what appears on the face of the record proper. If mani-

rel. Manhattan R. Co. v. Barker, 152 N. Y. 417, 46 N. E. 875 (1897), and an article by Julian T. Davies, 1 Columbia Law Review, p. 419.

"Here we must take note of the difference between jurisdictional error as to a court proceeding according to the course of the common law and such error as to a mere tribunal exercising quasi judicial authority. In the former, jurisdiction of the party and subject-matter being established, the determination cannot be successfully challenged for such error, though the basic questions of fact rest upon insufficient evidence, or have no foundation whatever therein. The judgment in such circumstances may be erroneous, but not reversible upon writ of certiorari for jurisdictional defect. In the latter, a clear violation of law in reaching a result within the power of the tribunal to reach proceeding properly is jurisdictional error. In the former, the evidence is not reviewable at all. In the latter, it may be reviewed, but only to the extent of determining whether there is evidence upon which the tribunal could reasonably and honestly have reached the conclusion which it did. The evidence cannot be weighed for the purpose of determining whether the same clearly preponderates against the decision. It may be looked into only to see whether there was competent evidence sufficient, in reason, to incline the mind efficiently to the conclusion reached. In the first a conclusion without any credible evidence to support it, or any evidence at all, is mere judicial error. In the second, want of credible evidence which, in case of the verdict of a jury, would be sufficient upon appeal to require a reversal is jurisdictional error—error committed outside of jurisdiction, instead of in the exercise of jurisdiction, where the writ takes hold, performing its function of returning the tribunal to its proper sphere of action." State ex rel. Milwaukee Medical College v. Chittenden, 127 Wis. 468, 107 N. W. 500 (1906).

fest error does not there appear, the order complained of must be affirmed. The testimony, remonstrances, etc., brought up with the record, form no part thereof, and cannot be resorted to for any purpose. Peet v. City of Pittsburgh, 96 Pa. 218.

If the court of quarter sessions had jurisdiction of the subject-matter and the plaintiff in error had his day in court, it must be presumed, until the contrary appears by the record, that the proceedings were regular. Omnia præsumunter rite esse acta.

The act of March 22, 1867 (Purd. Dig. p. 945, pl. 29), provides that it shall be lawful for the courts of quarter sessions "to hear petitions, in addition to that of the applicant, in favor of and remonstrances against the application for such license, and in all cases to refuse the same whenever, in the opinion of said court, having due regard to the number and character of the petitioners for and against such application, such license is not necessary for the accommodation of the public, and entertainment of strangers and travelers; and, upon sufficient cause being shown, the said courts shall have power to revoke any license granted by them." The court therefore had jurisdiction of the subject; it had the power, "upon sufficient cause being shown," to revoke the license which it had granted to plaintiff in error. He was duly brought into court, testimony was taken, and, as the record shows, after hearing and due consideration the court, in the exercise of the discretion with which it was invested, revoked the license. If there was anything on the face of the record to show affirmatively that the court acted arbitrarily and without cause, or that the cause shown was wholly insufficient, it would exhibit such an abuse of discretion as would demand a reversal of the order complained of; but nothing of the kind appears in the record before us, and we have no right to go outside in search of something on which to convict the court below of error, nor do we feel disposed to do so.

Appeal quashed, and order revoking the license granted to plaintiff in error affirmed.

PEOPLE ex rel. MALONEY v. LINDBLOM.

(Supreme Court of Illinois, 1899. 182 Ill. 241, 55 N. E. 358.)

Appeal from the circuit court of Cook county.

Petition for a common-law writ of certiorari, brought in the name of the People, on the relation of John Maloney, against Robert Lindblom, Edward Carroll, and John W. Ludwig, Civil Service Commissioners.

Mr. Justice CRAIG delivered the opinion of the court.

It will be observed upon an examination of the prayer of the petition that the petitioner asks that the certification of Aaron L. Brown may be rescinded and revoked, and that the name of the petitioner, John Maloney, may be certified by the commission to the commissioner

of public works in lieu of the name of Aaron L. Brown. It is apparent from the prayer of the petitioner that the scope and purpose of a common-law writ of certiorari are misconceived by him. This is not a proceeding in which the certification of Brown by the civil service commission can be set aside by the court, and the petitioner, John Maloney, placed in his stead, nor is it a contest in which the right of one of the parties to the place in question may be set aside and the other sustained. The only office of the writ of certiorari is to bring before the court the record of the proceedings of the inferior tribunal for inspection, and the only judgment to be rendered is that the writ be quashed or that the record of the proceedings be quashed. Chicago & Rock Island Railroad Co. v. Fell, 22 Ill. 333.

The petitioner seems to be laboring under another misconception in regard to his rights and the power of the court in a proceeding of this character. The inferior tribunal, where the record is brought before the court by writ of certiorari, may have erred in its rulings on questions of law during the progress of the trial, or it may have erred in the application of the law to the facts in reaching its final judgment, and yet those errors cannot be reviewed and corrected in a proceeding of this character. On a return to a writ bringing the record before the court the only proper inquiry is whether the inferior tribunal had jurisdiction and proceeded legally—i. e., followed the form of proceedings legally applicable in such cases—and not whether it correctly decided the questions arising upon the admission or exclusion of evidence, the giving and refusing of instructions, and other like questions, during the progress of the trial. The rulings of a court may be erroneous and yet it may have jurisdiction and proceed legally. Hamilton v. Town of Harwood, 113 Ill. 154. The rule announced in the case cited has been fully sustained by other cases. Donahue v. County of Will, 100 Ill. 94; Scates v. Chicago & Northwestern Railway Co., 104 Ill. 93. Here the jurisdiction of the civil service commission is not disputed, and it is apparent that the tribunal proceeded according to the forms of law applicable in such cases.

But it is said that the civil service commission made an erroneous decision in holding that Aaron L. Brown, who was engaged in the military service of the United States in 1861 and who had been honorably discharged, was entitled to preference under section 10½ of the act of 1897, as the section of the act was unconstitutional. It may be true that the civil service commission erred in its ruling on the hearing, but that is a question which cannot be inquired into by writ of certiorari. The civil service commission had jurisdiction and it proceeded according to the forms of law, and if that tribunal made a mistake in holding that the act of the Legislature was valid, and the facts presented brought Aaron L. Brown within the terms of the act which entitled him to a preference over the petitioner, the ruling of the tribunal was mere error, which cannot be reviewed in this proceeding.

We think the judgment of the court quashing the writ was correct, and it will be affirmed.

Judgment affirmed.[79]

POWELL v. BULLIS.

(Supreme Court of Illinois, 1906. 221 Ill. 379, 77 N. E. 575.)

Certiorari to review the action of the civil service commission of Chicago in removing Bullis as a patrolman from the police force.

HAND, J.[80] * * * The main reason urged by appellee as grounds for sustaining the judgment of the lower courts is that the record filed as a return to the writ does not show that Bullis was notified of the time and place fixed by the civil service commission for a hearing upon the charges preferred against him, or that he waived notice of the time and place of hearing by appearing before said police trial board or otherwise. Section 12 of the civil service act (Hurd's Rev. St. 1903, c. 24, § 457) provides: "No officer or employé in the classified civil service * * * shall be removed or discharged except for cause, upon written charges and after an opportunity to be heard in his own defense." And section 1 of rule 8 of the civil service commission provides: "The commission shall cause notice in writing to be personally served on the accused, or to be mailed to him at his own address, as shown by the records of the commission, stating the time (which shall not be less than five days after the service or mailing of such notice) and place when and where such charges will be investigated, and shall give the accused an opportunity to be heard in his own defense at such investigation."

The giving or waiver of such notice was clearly jurisdictional (Commissioners of Highways v. Smith, 217 Ill. 250, 75 N. E. 396), and as the court could only determine that question from an examination of the record filed as a return to the writ (Joyce v. City of Chicago, supra [216 Ill. 471, 75 N. E. 184]), and the record failed to show that Bullis had been notified or waived notice of the time and place of his hearing upon the charges preferred against him, we think the police trial board was without power to hear the charges made against him or the civil service commission to approve the same and order him discharged as a patrolman from the police force of the city of Chicago, and that the trial court properly quashed the proceedings of the commission.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.[81]

[79] See, also, Kammann v. Chicago, 222 Ill. 63, 78 N. E. 16 (1906).

[80] Only a portion of the opinion of Hand, J., is here printed. The court first holds that the writ may be issued where personal rights are involved as well as where property rights are involved.

[81] Accord: Lantz v. Hightstown, 46 N. J. Law, 102 (1884); Common Council of Oshkosh v. State, 59 Wis. 425, 18 N. W. 324 (1884).

PEOPLE ex rel. DELAWARE & H. CANAL CO. v. PARKER et al.

(Court of Appeals of New York, 1889. 117 N. Y. 86, 22 N. E. 752.)

Appeal from Supreme Court, General Term, Third Department.

FINCH, J. The relator complains of the judgment of the General Term, which dismissed its writ of certiorari issued under the act of 1880.[82] The illegality which was asserted as sufficient to invalidate and annul the assessment upon its corporate property was founded upon an inquiry into the title of the assessors to their office, and a denial of their right to act as such at all. The trial court found that the two who alone made up and certified the roll were not in truth assessors, either de jure or de facto. Assuming that to be true, the appellate court nevertheless held that the wrong could not be redressed in the proceeding adopted, and we agree with that conclusion.

The function of the writ of certiorari is to review the judicial action of inferior officers or tribunals. It assumes their existence, and the fact of official action, but draws in question the legality or correctness of that action. It is wholly unsuited to a case in which there is no officer and no tribunal, and where, as a consequence, there could not have been any judicial action, or anything to review. In People v. Covert, 1 Hill, 674, that doctrine was settled in an opinion unusually brief and curt, but which touched the precise difficulty. It is said of that case, and of others like it, that they dealt only with a common-law certiorari; that it was competent for the Legislature to extend the range of the writ, and broaden its application; and that such was the operation of the act of 1880. But a correct view of that enactment will not justify such a construction. The statute allows the writ to be issued upon the petition of a person "assessed," and who is aggrieved by that assessment, and desires to review it. There must be an allegation that the assessment is illegal or erroneous. When the writ is granted, it will not stay the proceedings of the assessors; and if, thereby, the relief of a judgment is not reached before the collection of the tax, the remedy provided is a reimbursement in the next year. The writ is to run to the assessors, who are to return the assessment roll, or copies thereof, and their official proceedings. In all this we observe that an old writ, whose function and character was well settled and understood, was applied to a new purpose, and moulded so far, and only so far, as was necessary to accomplish the review desired. But it remained a writ of review. It

[82] Laws N. Y. 1880, c. 269, provides that "a writ of certiorari may be allowed by the Supreme Court, on the petition, duly verified, of any person or corporation assessed, and claiming to be aggrieved, to review an assessment of real or personal property for the purpose of taxation, made in any town, * * * when the petition shall set forth that the assessment is illegal," etc.

assumed the existence of the officers whose judicial action it sought to examine, and was not changed into a plough to root up a trespass. In its application to the present case, it usurped the functions of a writ of quo warranto. It challenged the titles of the two assessors. It pronounced then intruders and usurpers, and denied their official character and rights.

When we remember that the writ of quo warranto has been abolished, and an action substituted; that such action is at law, and entitles the officer to a trial by jury; and that, under the Code, his title can only be challenged in that manner—we shall see that a writ of certiorari can of necessity perform no such office. It is quite true that the act of 1880 gives redress against not only an erroneous, but also an illegal, assessment, and in the latter case cancels and annuls the tax. But it contemplates an assessment made by proper officers, and which, although illegal in some respects, is not wholly and altogether void; for in the latter event there is abundant remedy open to the taxpayer, and a certiorari will rarely issue where other sufficient and adequate remedy exists. People v. Supervisors, 1 Hill, 198. The act of 1880 was intended to furnish a remedy where none before existed, and to reach error and illegality for which there was no adequate redress. As this case stood at special term, the relator was in no danger, and exposed to no risk. The collector would levy at his peril, for his warrant was void on its face. This court has held that the collector's authority consists of the assessment roll, and the formal warrant annexed; and these must be read together, in determining the officers' power and protection. Van Rensselaer v. Witbeck, 7 N. Y. 517. If, then, no assessors, and, so, no assessment roll, existed, the warrant would be void on its face, and confer no authority whatever. The collector could be sued if he levied, and the usurpers who directed him be held responsible; for the Special Term decided that the two men who signed the roll were not even assessors de facto. If they were such, the ground of the judgment would disappear; and, if they were not, the remedy was elsewhere.

Another suggestion, however, was made on behalf of the relator. Assuming that the titles of the two assessors could not be assailed in this proceeding, and so that we are bound to regard them as lawful officers, it was yet found that they acted illegally in fixing the assessed values without notice to Bogart, who was the third assessor. Such action by the majority is unlawful, and vitiates the whole assessment. Doughty v. Hope, 3 Denio, 598; People v. Supervisors, 11 N. Y. 563. But we are of opinion that the act of 1880 was not intended to, and does not, furnish the remedy, where the complaint is not of some error or illegality in one or more assessments, and the judicial action which evolved them, but asserts that there never were any valid assessments at all, and that the whole roll is utterly void; for in such case there is no judicial action to be reviewed and corrected, but an unauthorized wrong and trespass.

There never was any defect of remedies, in such a case, which made necessary a new enactment; and all the provisions of the act of 1880 seem to contemplate both assessors and an assessment roll, by whom or in which illegal steps may have been taken, or errors may exist, for the correction of which a certiorari should be awarded. Only in that manner could judicial action which was illegal or erroneous be reviewed. The act provides for striking an unlawful tax from the roll, but not the annulment and destruction of the roll itself. If that be wholly and absolutely void, it can confer no authority, and give no protection, and the remedies of the taxpayer against the offenders are ample, and have long existed.

The General Term were therefore right in their reversal, and the judgment should be affirmed, with costs. All concur, except PECKHAM, J., not sitting.

STATE ex rel. SCHAEFER v. SCHROFF.

(Supreme Court of Wisconsin, 1904. 123 Wis. 98, 100 N. W. 1030.)

Appeal from circuit court, Racine county.

Certiorari by the State, on the relation of Leonard G. Schaefer, against Henry J. Schroff, to review the action of the city council of Racine repealing a certain ordinance granting a liquor license. From a judgment in favor of the latter, defendant appeals. Reversed.

The relator obtained an ostensible license in July, 1903, to sell liquor in a part of the city of Racine, where an existing ordinance required the consent of certain neighbors as a condition precedent. In October it was represented to the council that such consents had been obtained by fraud and misrepresentation, and reversal of their action in granting the license was prayed; whereupon the council caused notice to be given to the relator to appear and show cause why his license should not be declared void for the specified reasons. Thereafter, in December, after some hearing and investigation, the council adopted a resolution that said ordinance "be and is hereby declared void and of no effect, and that the city clerk be and hereby is ordered to notify said Leonard Schaefer of the adoption of this resolution, and, further, that the money tendered by said Leonard Schaefer will be returned to him." The relator sued out writ of certiorari to review the validity of this resolution, to which return was made by the respondent as city clerk, showing substantially the situation above stated. The circuit court held, as matter of law, that the council had no jurisdiction or power to declare said license void, except upon the grounds and by the procedure specified by section 1558, Rev. St. Wis. 1898, for a revocation, and entered judgment, reversing, annulling, vacating, and setting aside the resolution of the council.

DODGE, J. (after stating the facts). We deem it entirely plain, upon inspection either of the return or petition, that the council was in no wise attempting to exercise the jurisdiction conferred upon it by section 1558, Rev. St. Wis. 1898, to revoke a license, valid at its inception, but which, by reason of subsequent misconduct, the common council is authorized to recall. The petition of neighbors, the notice to Mr. Schaefer, the facts investigated, and the final resolution mark an inquiry and attempt to decide upon the question whether the license was valid originally, or void by reason of fraud perpetrated upon the council in obtaining it. Hence we need not consider whether the council acquired jurisdiction to act in revocation of this license under section 1558, or, by improper proceeding, lost such jurisdiction. The act done was to declare that the license was, and always had been, void. And it may be conceded to the relator that there is much in the record indicating the idea, both on the part of the petitioners and on the part of the council, that such resolution might have conclusive effect as an adjudication of the invalidity of the ordinance. As relator urges, however, there is nowhere in the statute or charter any authority given to the city council to make any such decision. Of course, there is an inherent power in the city to investigate, and to reach conclusion as to the attitude which it will take—whether to contend for the invalidity of such a license or not to make such contention; just as there is the right in any individual to investigate facts, and make up his own mind as to his attitude with reference to the legal validity of an act done by him. But, in absence of some authority of law, the city council could go no further. The license was neither more nor less valid by reason of the resolution here assailed. Such resolution concluded no one, and might not only be attacked collaterally, but wholly disregarded by any forum in which the validity of the license might be presented for consideration and decision.

To this view both parties accede, and of its correctness we can have no doubt. As a result, however, it is obvious that it does no injury to the relator. It took away no right which he previously had. Its utmost effect was to notify him that the council purposed to contend that his ostensible license was invalid. But, if that question was ever presented in a judicial forum for investigation or decision, his right to have the same tried as an independent and original one was not in any respect affected by the decision. Certiorari is a discretionary writ, which should issue only when necessary to prevent injustice or unlawful injury. Courts will not concern themselves, by this extraordinary writ, to declare the invalidity of nonjurisdictional acts when the relator suffers no injury thereby. Knapp v. Heller, 32 Wis. 467; State ex rel. v. Mayor, etc., 101 Wis. 208, 77 N. W. 167. In both of these cases the issue of the writ by circuit court was reviewed, and reversed on the ground that the cases presented failed to show equity in the relator; hence, that the issue

of the writ was an abuse of the discretion of the lower court. In State ex rel. Anderson v. Timme, 70 Wis. 627, 36 N. W. 325, on an application to the original jurisdiction of the Supreme Court for a writ of certiorari, it was decided that the writ should not be issued, because the action of the land commissioners in investigating and declaring void a land patent was so entirely beyond their jurisdiction as to be wholly innocuous.

Complete analogy exists between the action of the land commissioners there considered and the action of the council now before us; at least from the standpoint of the relator. The action in each case was wholly without jurisdiction, could be of no possible force save as the mere gratuitous declaration of the opinion of the body from which it emanated, or at most a notification of that opinion and of their intended attitude; in one case toward the patent, in the other toward the license. We deem the reasoning of that case conclusive here—that it would be so needless an exercise of a court's power to review and pass upon the validity of that declaration that no court, in the proper exercise of its discretion, should issue its extraordinary writ of certiorari. Upon the same reasons it became the duty of the court, having issued the writ, upon being perhaps further enlightened as to the situation by the return, to have dismissed the proceedings.

Judgment reversed, and cause remanded, with directions to quash the writ and dismiss the proceedings.[83]

SECTION 59.—QUO WARRANTO[84]

STATE v. EVANS.

(Supreme Court of Arkansas. 1841. 3 Ark. 585, 36 Am. Dec. 468.)

RINGO, C. J., delivered the opinion of the court.

The pleadings, although they are in some respects rather uncertain and informal, are believed to be substantially good, if the facts disclosed are such as in law authorize the writ, or enable the state to

[83] The following additional cases in this collection are cases of certiorari: Hartman v Wilmington, 1 Marvel (Del.) 215, 41 Atl. 74 (1894); Queen v. Bowman, [1898] 1 Q. B. 663; Van Nortwick v. Bennett, 62 N. J. Law, 151, 40 Atl. 689 (1898); State (Morford) v. Board of Health of Asbury Park, 61 N. J Law, 386, 39 Atl. 706 (1898); People ex rel. Copcutt v. Board of Health of Yonkers, 140 N. Y. 1, 35 N. E. 320, 23 L. R. A. 481, 37 Am. St. Rep. 522 (1893); People ex rel. Shuster v. Humphrey, 156 N. Y. 231, 50 N. E. 860 (1898); Tomlinson v. State Board of Equalization, 88 Tenn. 1, 12 S. W. 414, 6 L. R. A. 207 (1889); Joyce v. Chicago, 216 Ill. 466, 75 N. E. 184 (1905); Queen v. Wood, 5 El. & Bl. 49 (1855).

[84] The remedy of quo warranto (in the modern practice, in the form of an information in the nature of a quo warranto) is not generally available

require the defendant to show his warrant or authority to preside upon the trial of and adjudicate the cases therein mentioned.

The first question, therefore, to be determined, is whether the action or legal remedy for the wrong supposed to have been committed, has not been misconceived. It must, we think, be conceded that the common law regards the proceeding by writ of quo warranto as the most appropriate remedy for the king, by which he may at pleasure require any subject, exercising a public franchise or authority which he cannot legally exercise without some grant or authority from the crown, to show by what warrant or authority he exercises it, and thereupon demand and have a judicial trial and determination of the legal right of the defendant to exercise such office or franchise, and that, by analogy, the state here may in like cases have the same remedy. But here, as in England, the object and effect of the proceeding must be either to oust the party defendant of the franchise, if he fails to show in himself a complete legal right to its exercise, derived from or under the authority of the state, or, if the franchise has been once legally granted, and has been forfeited by the defendant or those through whom he derives title to it, to seize it into the hands of the state. But it is believed that no precedent can be found where this writ was ever issued for the purpose of restricting or preventing any one legally possessed of a public office or franchise from exercising any right, authority, or privilege incident thereto, or claimed by virtue thereof. It is a legal proceeding, authorized exclusively for the purpose of investigating and determining, by judicial authority, the legal right to a public office or franchise, but is not nor ever was authorized by the common law to be used as the legal instrument or means of prohibiting or restraining a public officer, or person exercising a public franchise from the doing of any particular act or thing, the right of doing which was claimed by virtue of such office or franchise, and constituted a portion only or an integral part of the rights, powers, and privileges incident thereto.

For example, although it is the appropriate legal proceeding to oust or remove from office, by judicial authority, a person who is ineligible to the office of judge of the circuit court, or who has not been legally elected, appointed, commissioned, or qualified to hold such office, yet if the office be held by a person eligible thereto, who has been legally elected, or appointed, commissioned, and qualified to hold it, he cannot by such proceeding be legally prohibited or prevented from taking cognizance of and adjudicating any suit or proceeding instituted and pending for adjudication in any court which he is by law authorized to hold, although such court may not legally

for the protection of private rights against administrative action. Its principal uses are the correction of the illegal exercise of corporate powers and the determination of controversies regarding the title to public office. As to its history and use for these purposes, see Attorney General v. Sullivan, 163 Mass. 446, 40 N. E. 843, 28 L. R. A. 455 (1895).

possess jurisdiction of the matter, or authority to adjudicate and determine the controversy. So, if the commission be special, to hold plea of and adjudicate and determine certain cases particularly mentioned and described, a portion only of which he can legally adjudicate and determine, and he assumes jurisdiction over all of the cases so mentioned and described, notwithstanding the want of legal authority in him to adjudicate and determine a part of them, he cannot be legally restrained or prohibited therefrom as to the cases only which he has no legal right to take cognizance of, try, and decide, by any proceeding upon a writ of quo warranto; because the object and effect of the proceeding in such case would not be to oust or divest him of the office itself, but only to prohibit him from exercising a power incident to the office in regard to a particular case, thus conceding to the defendant the legal title to the office, and denying only his legal right to exercise it over a particular case, or in reference to some particular matter or subject, which is not and never was the legitimate office or object of such writ, or the proceedings thereupon authorized by law.

The defendant shows that the judge of the Fifth judicial circuit, embracing the county of Pulaski, had officially certified to the Governor the fact of his disqualification to preside on the trial of sundry cases then pending in the circuit court of said county, which were specially designated, and among which were the cases mentioned in the writ, and that the Governor thereupon appointed and commissioned specially the defendant for the trial and determination of the cases so certified, which were also specially enumerated in his commission, including with others the cases mentioned in the writ; and these facts are not controverted by the state, but are, by her replication, admitted to be true. The defendant therefore, from aught that appears in the pleadings before us, is eligible to and legally possessed of the office of judge of the circuit court, and notwithstanding his office and authority are limited to the trial and determination of the cases specified in his commission, he was unquestionably invested with legal authority to hold the circuit court in which such cases were pending, for their trial and determination, and in reference thereto was clothed with all the powers appertaining to said court, and was by law to preside therein pending their trial and determination, unless prevented by some legal remedy applicable to the case, and interposed, prosecuted, or presented by the parties themselves, instead of the state, if in fact he had no legal jurisdiction of, or right to try and determine, a portion only of the cases mentioned in his commission.

The writ before us does not require the defendant to show by what warrant he exercises the office or franchise of judge of the circuit court in and for the county of Pulaski, but simply demands of him to show by what authority he exercises said office in respect to the two cases therein mentioned, being a part only of the cases he was

commissioned specially to try. Nor does the replication question his legal right to the office itself, but simply denies the disqualification of the regular judge of the Fifth judicial circuit to adjudicate the cases mentioned in the writ, thus attempting, as it were, to divide the office, and to consider it as a distinct office depending upon a separate warrant in reference to each case, which the judge is commissioned specially to try and determine, contrary to the fact, as well as every principle of law and justice. This principle, if admitted to be true, might subject the officer to the vexation and expense of exhibiting his authority in every case pending for his adjudication, and a judgment in one case would be no bar to the demand made of him in another, nor could any judgment of ouster from office, or other legal judgment, that we are aware of, be pronounced against him in such case.

And therefore we are of the opinion that the legal remedy for the wrong, if any has been committed by the supposed unauthorized and illegal certification to the Governor, by the regular judge of the circuit court of Pulaski county, of the cases mentioned in the writ, has in this proceeding against the defendant been misconceived. And for this reason the demurrer to the replication must be sustained.[85]

PEOPLE ex rel. LONGRESS v. BOARD OF EDUCATION OF CITY OF QUINCY.

(Supreme Court of Illinois, 1882. 101 Ill. 308, 40 Am. Rep. 196.)

Mr. Chief Justice CRAIG delivered the opinion of the court.[86]

This was an information in the nature of a quo warranto, brought by the Attorney General, on the relation of John Longress, against the board of education of the city of Quincy, a corporation created by an act of the General Assembly approved February 20, 1861. Priv. Laws 1861, p. 252. The board of education is intrusted by law with the exclusive management and control of the public schools in the city of Quincy. * * *

It is averred in the information that on the 31st day of July, 1878, before that time, and since, there was a large number, to wit, five hundred persons of African descent, commonly called "colored persons," between the ages of six and twenty-one years, who for all that time have been and are now bona fide residents of said city of Quincy, and in the several school districts thereof, and have been and are at all times, and are now, ready to furnish to the principal of the proper school satisfactory evidence that they have been vac-

[85] Quo warranto held not to be the proper remedy to test the validity of an ordinance. State v. Lyons, 31 Iowa, 432 (1871); State v. Newark, 57 Ohio St. 430, 49 N. E. 407 (1898).

[86] Only a portion of the opinion of Craig, C. J., is printed.

cinated; and the said persons do now reside, and at all times heretofore have in good faith resided, in the different school districts of said city so established by the said the board of education of the city of Quincy, and are entitled to be admitted into the public schools of the districts in which they respectively reside, without being directly or indirectly excluded therefrom on account of their descent or color, yet the said the board of education of the city of Quincy, during all the time aforesaid, without warrant or authority of law, have adopted, maintained and enforced, for the management of the public schools of said city, and to exclude the said persons of African descent, commonly called "colored persons," from the said public schools in the districts in which they reside, on account of their descent and color, the following pretended rules and regulations for the government and management of the public schools of said city, that is to say: "That the colored schools of said city shall be composed of colored pupils who shall be of the prescribed age, and bona fide residents of said city; that no pupil of African descent shall be permitted to attend any of the public schools of the city other than the colored schools, and that all the colored pupils in said city shall attend a certain public school in said city, called the Lincoln School, and no other." All of which pretended rules and regulations for the government and management of said public schools in said city, the said the board of education of the said city of Quincy, without authority of law, do maintain and enforce, to the damage of the people of the state of Illinois, and against the peace and dignity of the same.

The board of education filed five pleas to the information, to which the Attorney General interposed a demurrer, which the court carried back and sustained to the information, and this decision of the court is assigned for error.

Whether a proceeding in the nature of a quo warranto, instituted by the Attorney General, will lie in a case of this character at common law, is a question which it will not be necessary to determine. The object of the proceeding was to test the legality of the rules adopted by the board of education, and if the statute is broad enough to authorize the court to inquire into the action of the board in adopting and enforcing the rules which excluded children of color from the public schools, then the information was proper, and the court erred in sustaining the demurrer.

Section 1, c. 112, p. 787, Rev. St. 1874, provides "that in case any person shall usurp, intrude into, or unlawfully hold or execute any office or franchise, * * * or any corporation does or omits any act which amounts to a surrender, or forfeiture of its rights and privileges as a corporation, or exercises powers not conferred by law, * * * the Attorney General, or state's attorney of the proper county, either of his own accord or at the instance of any individual relator, may present a petition to any court of record of competent

jurisdiction, or any judge thereof, in vacation, for leave to file an information in the nature of a quo warranto, * * * and if such court or judge shall be satisfied that there is probable ground for the proceeding, the court or judge may grant the petition," etc.

The board of education is a corporation created by law, clothed with the exercise of certain powers in relation to the public schools of Quincy. Now, if the board, in the discharge of its duties as a corporation, exercises powers not conferred by law, it is apparent that it will fall within the obvious meaning of the statute, unless the plain reading of the statute is to be disregarded. The very gist of the complaint here is that the board of education, a corporation, is exercising powers not conferred by law, unless it had the right to adopt and enforce the rules set out in the information. We are therefore clearly of opinion that, under the statute, the Attorney General had the right to file the information. * * *[87]

[87] See, also, People v. Town of Thornton, 186 Ill. 162, 57 N. E. 841 (1900). In Illinois, formerly, quo warranto was held not to be the proper remedy to test the validity of the extension of the powers of a municipal corporation over new territory. People v. Whitcomb, 55 Ill. 172 (1870). At present, quo warranto is held to be the proper remedy for that purpose. Evans v. Lewis, 121 Ill. 478, 13 N. E. 246 (1887); Shanley v. People, 225 Ill. 579, 80 N. E. 277 (1907).

In Kansas, quo warranto was used to oust a municipal corporation from the illegal exercise of the power to grant licenses for the sale of intoxicating liquor. State v. Topeka, 30 Kan. 653, 2 Pac. 287 (1883); Id., 31 Kan. 452, 2 Pac. 593 (1884).

See, also, State v. City Council of Charleston, 1 Mill, Const. (S. C.) 36 (1817).

With regard to the burden of proof in quo warranto proceedings, see note to State v. Kupferle, 44 Mo. 154, 100 Am. Dec. 265, 268 (1869).

The following additional cases in this collection illustrate the application of proceedings in the nature of quo warranto: People ex rel. Lewis v. Waite, 70 Ill. 25 (1873); People ex rel. Demarest v. Fairchild, 67 N. Y. 334 (1876); People ex rel. Raster v. Healy, 230 Ill. 280, 82 N. E. 599, 15 L. R. A. (N. S.) 603 (1907); Dullam v. Willson, 53 Mich. 392, 19 N. W. 112, 51 Am. Rep. 128 (1884); Wilcox v. People, 90 Ill. 186 (1878); People ex rel. Gere v. Whitlock, 92 N. Y. 191 (1883); State ex rel. Meader v. Sullivan, 58 Ohio St. 504, 51 N. E. 48, 65 Am. St. Rep. 781 (1898).

SECTION 60.—HABEAS CORPUS

Ex parte WATKINS.

(Supreme Court of the United States, 1830. 3 Pet. 193, 7 L. Ed. 650.)

MARSHALL, C. J.[88] This is a petition for a writ of habeas corpus to bring the body of Tobias Watkins before this court, for the purpose of inquiring into the legality of his confinement in jail. The petition states that he is detained in prison, by virtue of a judgment of the Circuit Court of the United States for the county of Washington, in the District of Columbia, rendered in a criminal prosecution carried on against him in that court. A copy of the indictment and judgment is annexed to the petition, and the motion is founded on the allegation that the indictment charges no offense for which the prisoner was punishable in that court, or of which that court could take cognizance, and consequently that the proceedings are coram non judice, and totally void.

This application is made to a court which has no jurisdiction in criminal cases (United States v. More, 3 Cranch, 169, 2 L. Ed. 397), which could not revise this judgment, could not reverse or affirm it, were the record brought up directly by writ of error. The power, however, to award writs of habeas corpus, is conferred expressly on this court by the fourteenth section of the judiciary act, and has been repeatedly exercised. No doubt exists respecting the power; the question is whether this be a case in which it ought to be exercised. The cause of imprisonment is shown as fully by the petitioner as it could appear on the return of the writ; consequently, the writ ought not to be awarded, if the court is satisfied that the prisoner would be remanded to prison.

No law of the United States prescribes the cases in which this great writ shall be issued, nor the power of the court over the party brought up by it. The term is used in the Constitution, as one which was well understood; and the judiciary act authorizes this court, and all the courts of the United States, and the judges thereof, to issue the writ "for the purpose of inquiring into the cause of commitment." This general reference to a power which we are required to exercise, without any precise definition of that power, imposes on us the necessity of making some inquiries into its use, according to that law which is in a considerable degree incorporated into our own.

The writ of habeas corpus is a high prerogative writ, known to the common law, the great object of which is the liberation of those

[88] Only a portion of the opinion of Marshall, C. J., is printed.

who may be imprisoned without sufficient cause. It is in the nature of a writ of error, to examine the legality of the commitment. The English judges, being originally under the influence of the crown, neglected to issue this writ, where the government entertained suspicions which could not be sustained by evidence; and the writ, when issued, was sometimes disregarded or evaded, and great individual oppression was suffered, in consequence of delays in bringing prisoners to trial. To remedy this evil, the celebrated habeas corpus act of 31 Car. II was enacted, for the purpose of securing the benefits for which the writ was given. This statute may be referred to as describing the cases in which relief is, in England, afforded by this writ to a person detained in custody. It enforces the common law. This statute excepts, from those who are entitled to its benefit, persons committed for felony or treason, plainly expressed in the warrant, as well as persons convicted or in execution. The exception of persons convicted applies particularly to the application now under consideration. The petitioner is detained in prison by virtue of the judgment of a court, which court possesses general and final jurisdiction in criminal cases. Can this judgment be re-examined upon a writ of habeas corpus?

This writ is, as has been said, in the nature of a writ of error, which brings up the body of the prisoner, with the cause of commitment. The court can undoubtedly inquire into the sufficiency of that cause; but if it be the judgment of a court of competent jursdiction, especially a judgment withdrawn by law from the revision of this court, is not that judgment in itself sufficient cause? Can the court, upon this writ, look beyond the judgment, and re-examine the charges on which it was rendered? A judgment, in its nature, concludes the subject on which it is rendered, and pronounces the law of the case. The judgment of a court of record, whose jurisdiction is final, is as conclusive on all the world as the judgment of this court would be. It is as conclusive on this court, as it is on other courts. It puts an end to inquiry concerning the fact, by deciding it. * * *[89]

[89] The following cases in this collection are cases of habeas corpus: In re Sawyer, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402 (1888); Langenberg v. Decker, 131 Ind. 471, 31 N. E. 190, 16 L. R. A. 108 (1892); Nishimura Ekiu v. United States, 142 U. S. 657, 12 Sup. Ct. 336, 35 L. Ed. 1146 (1892); Gonzales v. Williams, 192 U. S. 1, 24 Sup. Ct. 171, 48 L. Ed. 317 (1903); United States v. Sing Tuck, 194 U. S. 161, 24 Sup. Ct. 621, 48 L. Ed. 917 (1904); United States v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040 (1905); Chin Yow v. United States, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369 (1908).

SECTION 61.—PROHIBITION

The principal function of the writ of prohibition is to restrain inferior courts from proceeding in matters beyond their jurisdiction. Its use to control administrative action is exceptional and infrequent. See, for example, State ex rel. Ellis v. Elkin, 130 Mo. 90, 30 S. W. 333, 31 S. W. 1037 (1895); Speed v. Common Council, 98 Mich. 360, 57 N. W. 406, 22 L. R. A. 842, 39 Am. St. Rep. 555 (1894); People v. Supervisors of Queens County, 1 Hill (N. Y.) 195, 200 (1841); People ex rel. Pressmeyer v. Board of Commissioners of Police, 59 N. Y. 92 (1874). As to use of writ in South Carolina, see State ex rel. Carter v. Burger, 1 McMul. (S. C.) 418 (1841), and State v. County Treasurer, 4 S. C. 520, 534 (1873).

Writ held not to lie against an administrative body. La Croix v. County Commissioners of Fairfield County, 50 Conn. 321, 324, 47 Am. Rep. 648 (1882).

SECTION 62.—JUDICIAL DISCRETION IN ALLOWANCE OF EXTRAORDIARY LEGAL REMEDIES—MANDAMUS

PEOPLE ex rel. GAS LIGHT CO. v. COMMON COUNCIL OF SYRACUSE.

(Court of Appeals of New York, 1879. 78 N. Y. 56.)

CHURCH, C. J.[90] This is an appeal from a judgment denying a mandamus to compel the common council of the city of Syracuse to proceed to the assessment and collection of a tax sufficient to pay the relator and another property owner the appraised value of lands proposed to be taken for street purposes. The commissioners appointed to appraise the value of the lands filed their report December 11, 1871, and on October 13, 1873, the common council passed a resolution rescinding the original resolution to widen the street and condemn lands therefor, and declared that all proceedings taken pursuant thereto were abandoned and discontinued. The application for a mandamus was made June 29, 1875.

The two material questions presented are: First. Whether the common council had the legal right as against the property owners to discontinue the proceedings. Second. If this should be determined in the negative, whether the lapse of time and other circumstances justified the judgment refusing a mandamus. [The discus-

[90] Only a portion of the opinion of Church, C. J., is printed.

sion of the first question is omitted. The court concluded that the rescinding resolution was void.]

As to the question whether the court below was justified in refusing a mandamus on account of the lapse of time which intervened, there is more embarrassment. The writ of mandamus is called a prerogative writ. It originated from a necessity to furnish a remedy to compel the performance of a specific duty, in cases where the ordinary forms of legal procedure furnished no adequate remedy, and issued by the exercise of the sovereign power of the king, who originally sat in the King's Bench in person. 1 Bl. Com. 239. As this exercise of power could not be controlled, the issuing of the writ was necessarily discretionary, and [it] was liable to be issued or refused as the king might see fit.

When the power became vested in the courts of England, and when transmitted to our own courts, it has been and is still regarded as discretionary, as distinguished from a writ of right. But although in this sense discretionary in the court to grant or refuse this remedy, yet it is not an absolute and arbitrary discretion, but the power is to be exercised, and may be regulated and controlled by certain rules of law dictated by experience, and incorporated into our system of judicature. Fish v. Weatherwax, 2 Johns. Cas. 215, note, and cases cited. The distinction between an absolute discretion, and that which is governed by legal rules, is well recognized. The former is not reviewable; the latter is. Howell v. Mills, 53 N. Y. 322. This case belongs to the latter class. There must be a clear legal right. We have seen that such right existed. There must be no other adequate remedy. It is not disputed that such was the fact.

It is insisted that the relator has lost his right by delay. Some delay was necessary. The commissioners were to be put in motion, local assessments, and perhaps general assessments, were to be made, perfected, and collected, and this would occupy an indefinite period of time. How long does not appear. The case seems to have been tried upon the pleadings, and it was alleged that the relator had often requested the common council to make the assessment. It nowhere appears what answer was made to these applications, whether the council refused, or promised performance, so that up to the period of the resolution of abandonment there is nothing in the case to show a want of vigilance on the part of the relator or any indisposition on the part of the common council to perform their duty. But after that it is argued that from the lapse of time before applying for the writ, about twenty months, it may be inferred that the relator acquiesced in the abandonment, and it is laid down as a rule that a party must not sleep upon his rights. There would be some force in this position if it appeared that the relator knew of this action of the common council; but this fact is neither alleged, nor proved. I have been unable to find any authority for the position

that a mere delay of this character has been fatal to the right of a party to this remedy, when a clear legal and substantial right has been shown. * * *

When the relator has for an unreasonable time slept upon his rights, the court may in the exercise of a sound discretion refuse the writ. In determining what will constitute such unreasonable delay, regard should be had to circumstances which justify the delay, to the nature of the case and the relief demanded, and to the question whether the rights of the defendant or of other persons have been prejudiced by such delay. Chinn v. Trustees, 32 Ohio St. 236. The difficulty with the case on the part of the defendant is that no facts were shown which would justify a refusal of the writ, except a delay which may in part at least have been caused by the defendant. There is nothing to show but that the plaintiff supposed that the proceedings were progressing, or that he thought an abandonment was contemplated, nor any change of circumstances shown, rendering the consummation of the improvement impracticable or specially injurious to the defendant or individuals. That question seems not to have been litigated on the trial. The circumstances should be shown which according to established rules justify a refusal of the writ.

In King v. Canal Co., 1 M. & C. 35, there was delay, and another remedy. In King v. Commissioners, 20 Eng. Com. Law, 525, there was delay, and the issuing of the writ would have been prejudicial to the intervening private rights of others, and in all the cases circumstances appeared which according to settled rules of public policy warranted a refusal of the writ. 2 Crary's Prac. 51, 52, and cases cited; 5 Wait's Prac. 552.

When the relator shows a fixed legal right to compensation for lands condemned for public purposes, a mere delay of the character appearing in this case is not sufficient to deprive him of the right. People v. Board of Supervisors, 12 Barb. 446. The nature of the case is such that circumstances may exist rendering it improper to grant the writ, but no such facts appeared. A new trial may develop them.

We do not deem it necessary to notice the other points. * * * As the case appeared, we think it was error to refuse the writ.

The judgment must be reversed, and a new trial granted, costs to abide event. All concur, except ANDREWS, J., absent.

Judgment reversed.[91]

[91] See, also, People ex rel. Stettauer v. Olsen, 215 Ill. 620, 74 N. E. 785 (1905).

SECTION 63.—SAME—CERTIORARI

PEOPLE ex rel. CHURCH v. ALLEGANY COUNTY SUP'RS.

(Supreme Court of New York, 1836. 15 Wend. 198.)

Certiorari to county board of supervisors.

BRONSON, J.[92] * * * The question, then, involved in this proceeding, is whether the tax lists of the several towns in the county of Allegany, in which the relator was assessed in the year 1832, and the warrants issued to the collectors, shall be quashed and annulled for irregularity. What would be the probable consequences of such a judgment as we are asked to pronounce? How many hundreds of suits would it authorize against each of the twenty-six supervisors, who are defendants, and what would be the condition of the several officers who have collected the tax? If the relator has a right to prosecute the writ ex debito justitiæ, these inquiries should have no influence upon the disposition which is to be made of the cause. The court must pronounce its judgment, and leave the consequences to others. But if, in awarding writs of this description, the court is to exercise a sound legal discretion, and grant or refuse the process as the ends of justice and the public interest may require, we are not at liberty to shut our eyes to the consequences which may follow from entertaining this proceeding. It is not necessary to decide that actions could be maintained, either against the supervisors or the collectors, in the event of a judgment in favor of the relator. It is enough that such suits would probably be brought, and it is not entirely clear, to say the least, that they could not be maintained.

In the exercise of the superintending power of this court over inferior jurisdictions, the writ of error is a writ of right, and issues on conforming to such regulations as have been prescribed by law. But the writ of certiorari, especially in those cases where it is used for the purpose of reviewing the acts and decisions of the special jurisdictions which are created by statute, and do not proceed according to the course of the common law, such as boards of supervisors, commissioners of highways, and the like, does not issue ex debito justitiæ, but only on application to the court and special cause shown. The reason is that these bodies exercise powers in which the people at large are concerned, and great public detriment or inconvenience might result from interfering with their proceedings. The writ cannot be allowed by a judge at chambers, but only by the court itself. Starr v. Trustees of Rochester, 6 Wend. 565; Comstock v. Porter, 5 Wend. 98; Albany Water Works Co. v. Mayor's Court, 12 Wend

[92] Only a portion of the opinion of Bronson, J., is printed.

292. In The King v. Eaton, 2 T. R. 89, on a motion for a writ to remove a conviction before a justice of the peace, Buller, J., said that the rule requiring the defendant to lay a ground before the court for granting a certiorari had obtained since the time of Charles II, and he cited a case of that day, where it was held as clear law that a certiorari ought not to be granted in vacation, but in open court, and upon a ground shown. Commonwealth v. Downing, 6 Mass. 72; State v. Vanderveer, 7 N. J. Law, 38.

In Arthur v. Commissioners of Sewers, 8 Mod. 331, it was remarked by one of the judges that "a writ of certiorari was not a writ of right, for if it was it could never be denied to grant it; but it has often been denied by this court, who, upon consideration of the circumstances of the case, may deny it, or grant it at discretion." And Bacon (Abr. tit. "Certiorari," A) says, although the writ ought of right to be issued at the instance of the king, for the purpose of removing an indictment, yet the court "has a discretionary power in granting or refusing it at the suit of the defendant." He cites cases in which the court has refused to grant the writ. In Ludlow v. Ludlow, 4 N. J. Law, 387, Kirkpatrick, C. J., says the very issuing of such a writ is the exercise of a high judicial power, and must, in its nature, be discretionary. In Lees v. Childs, 17 Mass. 351, it was held that an application for a certiorari was addressed to the discretion of the court, and would not be granted, but on showing probable cause for supposing that injustice has been done. In Ex parte Weston and Others, 11 Mass. 417, the court held the same doctrine; and although that was a case which did not affect the public, but the rights of individuals only, the court said that before granting a certiorari they would always look into the record, and even into the circumstances attending the process, "because, when the record is actually returned, in obedience to the writ of certiorari, they are bound to quash the whole proceeding, if error should appear." * * *[93]

INHABITANTS OF RUTLAND v. WORCESTER COUNTY COM'RS.

(Supreme Judicial Court of Massachusetts, 1838. 20 Pick. 71.)

PER CURIAM.[94] * * * A petition for a writ of certiorari is well understood to be addressed to the discretion of the court. When the record is before the court upon the return of the writ, the court will look only at the record. For this reason it would be futile to

[93] Accord: People ex rel. Vanderbilt v. Stilwell, 19 N. Y. 531 (1859); People ex rel. David v. Hill, 53 N. Y. 547 (1873); People ex rel. Corwin v. Walter, 68 N. Y. 403 (1877); People ex rel. Waldman v. Board of Police Com'rs, 82 N. Y. 506 (1880).

[94] Only a portion of the opinion is printed.

admit evidence to contradict the record, on the petition for a certiorari; but, it being within the discretion of the court to grant or refuse the writ, evidence extrinsic to the record may very properly be received, to show that no injustice has been done, and that a certiorari ought not to be issued. The petitioners in the case before us will in the first place exhibit the record and point out in what particulars they deem it to be erroneous or defective; and then the respondents may prove by extrinsic evidence that no injustice has been done, that if the proceedings shall be quashed the parties cannot be placed in statu quo, or that for any good reason a certiorari ought not to be granted. If such evidence shall be offered by the respondents, the petitioners will of course have a right to rebut it by like evidence. * * *[95]

TRUSTEES OF SCHOOLS OF TOWN 21 N., RANGE 5 W. v. SCHOOL DIRECTORS OF UNION DISTRICT.

(Supreme Court of Illinois, 1878. 88 Ill. 100.)

Mr. Chief Justice SCHOLFIELD delivered the opinion of the court.

The only question we deem it necessary to consider in the present case is whether appellee should be held to be barred from inquiring into the validity of the act of detaching territory from the one school district and adding it to the other, by reason of the laches in suing out the certiorari.

The writ of certiorari, when used for the purpose of correcting the proceedings of inferior tribunals, is not a writ of right; but it issues only upon application to the court, upon special cause shown. Bath Bridge Co. v. Magoon, 8 Greenl. (Me.) 293; Drowne v. Stimpson, 2 Mass. 441; Lees v. Childs, 17 Mass. 352; Huse v. Gaines, 2 N. H. 210; Munro v. Baker, 6 Cow. (N. Y.) 396; People v. Supervisors, 15 Wend. (N. Y.) 198; State v. Senft, 2 Hill (S. C.) 367; Rockingham v. Westminster, 24 Vt. 288. And the reason is said to be because these bodies exercise powers in which the people at large are concerned, and great public detriment or inconvenience might result from interfering with their proceedings. People v. Supervisors, supra. As a corollary it follows that, whenever great public detriment or inconvenience might result from interfering with their proceedings, the writ of certiorari should be denied. And, on this principle, in Elmendorf v. Mayor, etc., 25 Wend. 693, the Supreme Court of New York refused a certiorari to remove the proceedings of the common council of New York, changing the grade of certain streets, three years and a half after the confirmation. It is true, in that state a writ of error would not lie, under the statute, after the expiration of two years, and it was said the court would, by analogy

[95] Accord: Hyslop v. Finch, 99 Ill. 171, 179 (1881).

to the statute, in ordinary cases, refuse a certiorari after the lapse of that period; but the decision was placed expressly upon the ground that there had been unreasonable delay, and that serious consequences to the city must result from allowing the writ. Nelson, C. J., who delivered the opinion of the court, said: "I place my refusal to allow the certiorari upon the unreasonable delay in the application for it, and the serious consequences to the city which must necessarily follow the granting of it after such a lapse of time, during which the improvement has been finished, and two-thirds of the assessment paid by owners." This principle is also recognized and applied in Rutland v. County Com'rs, etc., 20 Pick. (Mass.) 79, 80; In re Lantis et al., 9 Mich. 324, 80 Am. Dec. 58; Chamberlain v. Berclay, 13 N. J. Law, 244; Bell v. Overseers, 14 N. J. Law, 131; Dailey v. Bertholomew, 1 Ashm. (Pa.) 135.

It is not questioned but that there was power to detach territory from the one district and add it to the other; but it is only objected that the power had not been exercised by the proper officers in the mode prescribed by the statute. It would, therefore, seem very clear that the omission complained of is one that would have been supplied by a subsequent express ratification of the act, and, if this be true, we know of no reason why in this, as in many other instances of defective execution of powers by corporations, a ratification may not be inferred from acquiescence. In Metz et al. v. Anderson et al., 23 Ill. 469, 76 Am. Dec. 704, this court, arguendo, said: "But if it could be shown that the order changing the districts, by consolidating two districts into one, was an unwarrantable exercise of power, it might, with propriety, be claimed that there has been an acquiescence in it by the functionaries of the now complaining district 9." In this view, the doctrine of the cases above referred to must be held to be conclusive in the present case.

The petition here was filed July 15, 1875, and the action of the trustees complained of was had in April, 1872, over three years before. A proper plat of the districts, as constituted after the changes effected by the action of the board, was made and filed with the county clerk at the time; and thereafter the school funds were apportioned in accordance with such changes, and the presumption is that taxes for school purposes were thus levied and collected. It may be, also, that debts have been incurred in building or repairing school houses, or for other legitimate school purposes, upon the faith of the action of the trustees, now for the first time sought to be questioned.

The case, in our opinion, is clearly one where, by reason of the lapse of time and the acquiescence of the party now complaining in the distribution of school funds, the levy and collection of school taxes, and, possibly, the incurring of debts, upon the faith of the action of the trustees, it was improper to allow the writ; but, having been allowed, it should have been quashed, on motion.

It is better, if it shall be desirable, by appropriate steps through the

proper school officers, to reorganize the districts as they were before, than to open up an indefinite field of strife and litigation by now nullifying the action of the trustees, and thereby declaring everything done pursuant thereto illegal.

Some question was made in argument as to the right to consider this question on appeal, but we presume not seriously, since the right of appeal now exists, by statute, from all final judgments.

It is true the court below was invested with discretion, to some extent, whether to grant or to refuse the writ; but that discretion did not authorize the granting of the writ in a case where, by law, it clearly ought not to have been granted. The discretion was not an arbitrary one, but one to be exercised in subordination to legal principles, and we may always inquire whether those principles have been adhered to or departed from. The judgment is reversed.

Judgment reversed.[96]

SECTION 64.—SAME—QUO WARRANTO

PEOPLE ex rel. LEWIS v. WAITE.

(Supreme Court of Illinois, 1873. 70 Ill. 25.)

Appeal from the criminal court of Cook county; Lambert Tree, Judge.

This was an application by the state's attorney for leave to file an information of the relator, in the nature of a quo warranto, against George W. Waite. The opinion of the court gives a summary statement of the case and the facts. The relator appealed.

Mr. Justice Scott delivered the opinion of the court.

Our statute, in relation to informations in the nature of a quo warranto, is a substantial, if not a literal, copy of 9 Anne, c. 20, on the same subject. The granting of leave to file such informations has uniformly been held, both in this country and in England, to be within the sound discretion of the court. Leave is not given as a matter of course, but a court ought not arbitrarily to refuse leave, but should exercise a sound discretion, according to law. Dillon on Mun. Corp. § 722; State v. Tehoe, 7 Rich. 246; Commonwealth v. Arrison, 15 Serg. & R. (Pa.) 133, 16 Am. Dec. 531; People v. Sweeting, 2 Johns. (N. Y.) 184; King v. Hythe, 6 Barn. & Cres. 247; King v. Peacock, 4 Term R. 684; King v. Stacy, 1 Term R. 1.

The mode for instituting such proceedings is, usually, as pursued in the case at bar. The state's attorney submitted a motion, based on affidavit, for leave to file an information in the nature of a quo war-

[96] Accord: Chicago v. Condell, 224 Ill. 595, 79 N. E. 954 (1906).

ranto. A rule nisi was laid on defendant to show cause why the information should not be filed. Respondent answered the rule by counteraffidavits. This practice is warranted by the authorities. People v. Shaw, 14 Ill. 476; King v. Symons, 4 Term R. 221; People v. Tibbets, 4 Cow. (N. Y.) 383; People v. Richardson, 4 Cow. (N. Y.) 103 and notes.

For cause shown, the court no doubt has a discretion to grant or refuse the leave asked, according to the circumstances. Relator claims he was, in a legal manner, elected school trustee for township 38, and that respondent has usurped that office, and now holds it, and is exercising its functions without authority of law. The affidavit shows respondent was himself elected to that office, by the qualified voters of the town.

It is insisted, however, the election was void, for the reason it was not held at the place designated in the notices required by law to be posted prior to holding the election. The counteraffidavits show relator participated in the election he now seeks to have declared void, by voting thereat, and was himself an opposition candidate to respondent. Relator knew then, as well as now, what irregularities had intervened in the conduct of the election, and he ought not to be permitted to disturb the public welfare by having an election declared void in which he participated with a full knowledge of all irregularities that existed. A sound public policy forbids it. The only informality charged is the election was held at an improper place. This fact was known to relator. He uttered no complaint at the time, but submitted his claims to the office to the voters of the town voting at that place, and claimed the right to and did have his own vote recorded.

These facts make it inequitable that he should have the remedy sought, and the court, in the exercise of a sound, legal discretion, properly discharged the rule. The judgment must therefore be affirmed.

Judgment affirmed.

PEOPLE ex rel. DEMAREST v. FAIRCHILD, Atty. Gen.

(Court of Appeals of New York, 1876. 67 N. Y. 334.)

Appeal from order of the General Term of the Supreme Court in the Third Judicial Department, affirming an order of Special Term, which denied a motion for a writ of peremptory mandamus. Reported below, 8 Hun, 334.

The relators alleged that they were duly elected aldermen and assistant aldermen of the city of New York, pursuant to the city charter, and took the oath of office; that the boards of aldermen and assistant aldermen duly organized as such, but that the mayor refused to recognize them; that the act (chapter 335, Laws 1873) abolishing

the board of assistant aldermen and establishing what is termed the minority system of electing the board of aldermen was unconstitutional; that Samuel Lewis and others, claiming to have been elected aldermen under said act, organized themselves as a board of aldermen, were recognized by the mayor, and are pretending to discharge the duties of the office; and that the Attorney General has refused to bring an action to determine the title to the office. The motion was for a writ of mandamus requiring him to commence and prosecute such an action.

ALLEN, J. The language of the statute authorizing actions in the nature of a quo warranto to try the title to office is very guarded, and does not give the action as of right to every individual who may think that an office to which he has been legally chosen or appointed has been usurped by another, or who may volunteer to become an informer. It says the action "may be brought by the Attorney General" upon his own information or upon the complaint of any private party. Code, § 432. Prior to the Revised Statutes leave of the Supreme Court was required for the institution of proceedings of this character. 1 Rev. Laws, 108, § 4. Under that system, the court in this state exercised a sound discretion in granting or withholding leave to file an information in the nature of a quo warranto. People v. Sweeting, 2 Johns. 184. A like discretion was exercised by the courts in England under similar statutes. Rex v. Sargent, 5 T. R. 467. By the Revised Statutes, the necessity of an application to the court was dispensed with and the discretion before then vested in the court was transferred to and vested in the Attorney General, whose province it was at the common law to determine whether a case had arisen in which the public interests required the proceedings to be instituted. 2 Rev. St. 581, § 28; Rev. Notes, 5 Stat. 516.

The primary object of the action is to protect the public against the usurpation of office without legal authority, and the determination of the right of another to the same office is merely an incident to the action, and is permitted for the reason that ordinarily the judicial ouster of the incumbent in effect establishes the right of the adverse claimant to the office, and if the Attorney General brings an action to eject an alleged usurper from an office, he may be compelled to join with the people, as plaintiff, the name of the person on whose relation the action is brought. Code, § 434. He has a discretion whether he will bring the action, but not as to the proper parties if an action is brought. It is evident that the Legislature used the words "may" and "shall" intelligently and with a purpose, and that no positive duty is imposed upon the Attorney General to bring an action upon request of a party claiming office from which he is expelled. The statute does not give the individual claiming the office or any other person the legal right to compel an action to be brought by the law officer of the state, or to bring an action in the name of the

people. The control over the action and the right to bring it is with the Attorney General, and the courts cannot sit in judgment upon the exercise of his discretion or coerce his action. The language of the act is very circumspect and precludes the idea that the Legislature intended to subject the action of the Attorney General in a matter thus affecting the public interest to the dictation of individual interests or to judicial reviews. Judge Harris, in a well-considered opinion (reported as People v. Attorney General, 22 Barb. 114), shows that a mandamus will not lie to compel the Attorney General to commence an action in the nature of a quo warranto at the instance of a claimant of the office in dispute.

The counsel for the relators concedes that the doctrine that the right to decide whether a quo warranto should issue is vested in the Attorney General may be sound when two officers claim under the same system conceded to be constitutional, but contends that inasmuch as the relators do not claim the seats of the intruders, but for a restoration of what they claim to be the constitutional government of New York City, and that they are entitled to distinct offices under the form of government attempted to be abrogated, the determination of that official is not final, but their right to his intervention by action is absolute. It would seem that in this view any citizen would have an equal right with the relators to inaugurate an action to test the constitutionality of the law under which the city officials hold office. The constitutionality of the law can be tested when the question properly arises in an action in which it becomes material, but the Attorney General cannot be compelled to bring an action merely for the settlement of that question. But the right of the relators is not affected by the questions of law or of fact upon which they propose to test the right of the incumbents to their offices, and the case is not distinguished favorably to the relators from People v. Attorney General, supra. The Attorney General may have erred in judgment, and for this there is no remedy. If he has acted corruptly or from unworthy motives, and the legal rights of the relator have been prejudiced, this is not an appropriate remedy.

The order must be affirmed. All concur.

Order affirmed.

PEOPLE ex rel. RASTER v. HEALY, State's Atty.

(Supreme Court of Illinois, 1907. 230 Ill. 280, 82 N. E. 599, 15 L. R. A. [N. S.] 603.)

Appeal from Circuit Court, Cook County.

Mandamus, by the People, on the relation of Edwin O. Raster, to compel John J. Healy, as State's Attorney, to sign a petition for leave to file an information in the nature of a quo warranto. From a judg-

ment for respondent, petitioner appeals. Reversed and remanded, with directions.

SCOTT, J.[97] This controversy involved the construction of section 1 of chapter 112 of Hurd's Revised Statutes of 1905, which reads: "That in case any person shall usurp, intrude into, or unlawfully hold or execute any office or franchise, or any office in any corporation created by authority of this state, * * * the Attorney General or state's attorney of the proper county, either of his own accord or at the instance of any individual relator, may present a petition to any court of record of competent jurisdiction, or any judge thereof in vacation, for leave to file an information in the nature of a quo warranto in the name of the people of the state of Illinois, and if such court or judge shall be satisfied that there is probable ground for the proceeding, the court or judge may grant the petition, and order the information to be filed and process to issue. * * *"

It is contended by the appellee that this statute vests the state's attorney of the proper county with an arbitrary discretion in reference to seeking leave to file an information in the nature of a quo warranto in the name of the people, that in the exercise of that discretion he cannot be controlled by the courts, and that he may refuse to seek the leave for any reason which to him seems sufficient or may refuse when no reason at all can be assigned for so doing; while appellant argues that in a case such as that now before us, where the proposed individual relator has a personal and private interest in the litigation which he desires to set on foot and where the interest of the public is purely or largely theoretical, the only discretion vested in the legal representative of the people is a discretion to determine whether the documents presented to him by the individual are in proper legal form, and whether the party seeking the institution of the suit presents evidence of such facts as establish his legal right to the remedy to be afforded by judgment against the respondent in the quo warranto proceeding.

Originally a proceeding of this character was by writ of quo warranto against any one who claimed or usurped any office, franchise, or liberty to inquire by what authority he supported his claim, in order to determine the right. Later the practice was changed, and an information in the nature of a writ of quo warranto succeeded the former method. 3 Blackstone's Com. 262, 263. By the common law the proceeding in quo warranto was employed exclusively as a prerogative remedy, to punish a usurpation of franchises or liberties granted by the crown, and never as a remedy for private citizens desiring to test the title of persons claiming to exercise a public franchise or desiring to establish a private right. In England the information, as a means of investigating and determining civil rights between parties, owes its origin to St. 9 Anne, c. 20, which authorized

[97] Only a portion of the opinion of Scott, J., is printed.

and required the proper officer to file the information by leave of court, upon the relation of any person desirous of prosecuting the same, against any person usurping or intruding into any municipal office or franchise in the kingdom. High on Extraordinary Legal Remedies (3d Ed.) § 602. That statute, however, having been passed in the year of our Lord 1710, has never been in force in this state.

It will be observed from examination of section 1, supra, that the proceeding is made the vehicle for the assertion of many rights, both private and public, which could not have been vindicated by this method at the common law. As originally used, the proceeding was criminal in character, and the offender, upon conviction, was liable both to fine and imprisonment as well as ouster from the franchise or liberty which he had wrongfully usurped. Under our statute the proceeding is, in fact, a civil remedy when used for the protection of private rights, and, in the event of a judgment in favor of the defendant costs may be awarded against the relator. Chapter 112, § 6, supra.

By the common law, and in England prior to the passage of the statute of Anne, arbitrary discretion was lodged in the Attorney General to determine whether he would move, and that discretion could not be controlled or reviewed. Attorney General v. Ironmongers' Co., 2 Beav. 314; Attorney General v. Wright, 3 Beav. 447; People v. Attorney General, 22 Barb. (N. Y.) 114; People v. Fairchild, 8 Hun (N. Y.) 334; In re Gardner, 68 N. Y. 467; Everding v. McGinn, 23 Or. 15, 35 Pac. 178. In extending the scope of this proceeding, the Legislature of this state has not by express words changed or altered the common law so far as the discretion vested in the Attorney General or state's attorney is concerned, but the character of the discretion possessed by these officers must be determined, to some extent, by consideration of the rights which the lawmaking power has committed to that discretion.

By the common law the information in the nature of a quo warranto was solely a prerogative remedy. No suit was ever prosecuted by that remedy at the instance of a private person or for the assertion of a private right. It was used only where a wrong had been done, or was alleged to have been done, to the king, and it was therefore the rule that only the king, or his representative, should determine whether a suit should be brought to enforce the right of the king. Where jurisdiction is given the courts to enforce the rights of private individuals by this method, it is manifest that the power to determine whether the suit should be brought should not be lodged in the legal representative of the sovereign power, when, as here, the right of the citizen is substantial and the concern of the state with regard to the litigation is practically or entirely theoretical. In such case, the reason for the rule having failed, the rule itself should fail. This is well illustrated by cases of one class which are constantly arising in this state. These are cases where it is charged by the owner

of realty that his property has been wrongfully included within a drainage district, and he has attempted to have that question determined upon an application made for a judgment and order of sale against his property for the collection of a tax or assessment imposed by the drainage authorities. In such instances this court has invariably held that he could not raise the question in that way, but that he must resort to an information in the nature of a quo warranto for the purpose of determining whether or not the corporation is engaged in exercising powers not conferred by law. Shanley v. People, 225 Ill. 579, 80 N. E. 277, and cases there cited.

It is manifest that it would be a mere travesty to say, as was said in the Shanley Case, that in such case the action of the corporate authorities "can only be reviewed in a direct proceeding by quo warranto," and then to say that whether or not application shall be made for leave to file an information in the nature of quo warranto for the purpose of reviewing the action of the commissioners rests solely in the arbitrary discretion of the legal representative of the people, who has no interest in the welfare of the proposed relator, and who may give weight to the fact that it is for the benefit of a large number of property owners who are properly within the district that he should refuse to permit the use of his name, and who may regard that as a sufficient reason for declining to act. It is against the policy of our law that the arbitrary power to determine whether the individual shall have the privilege to be heard in the courts in the assertion of his private right should be lodged in any tribunal or officer not a court or judicial officer as distinguished from a nonjudicial or quasi judicial officer.

Appellee urges that it cannot consistently be held that the state's attorney has an arbitrary discretion as to whether he will seek leave to file the information where no interest is involved save that of the public, and that he has no discretion where the interest of a private individual is concerned, for the reason that such discretion as he has is conferred upon him by the following words from the statute: "The Attorney General or state's attorney of the proper county, either of his own accord or at the instance of any individual relator, may present a petition to any court of record of competent jurisdiction"—which words apply alike to cases in the prosecution of which the people of the state alone are interested and to cases in which no substantial right is to be asserted except the right of the relator, and in which the interest of the public is purely or entirely theoretical.

It is urged that any such construction would result in holding that the word "may," in the language last quoted, means "may" in cases where only the public interest is at stake, and means "shall" where private interests are involved; and it is said to be an anomaly to hold that the same word in the same sentence of a statute may mean one thing when applied to one class of cases and another thing when ap-

plied to another class of cases. We do not think this situation presents any serious difficulty. When the Legislature extended the right to private individuals to assert private rights by this proceeding, it is apparent that it was intended that they should have an opportunity to seek redress for their wrongs by making application to a court, or judge thereof, for leave to file an information. The duty resting upon the state's attorney to sign and present a petition for leave to file an information in the nature of a quo warranto where evidence of facts is properly presented to him by a proposed relator which shows prima facie that the relator is legally entitled to the relief, in reference to a private right, which would be afforded him by a judgment in his favor in a quo warranto proceeding, is an absolute one.

It follows, therefore, that where he declines to act for any reason other than that the facts, evidence of the existence of which is presented to him, do not warrant the relief which the proposed relator seeks, or that the petition and affidavit or affidavits presented to him are not in proper legal form, his declination is an abuse of his discretion, conceding that his construction of the statute be correct, and such an abuse of discretion as amounts to a refusal on his part to exercise his discretion at all and to a refusal to perform the duty enjoined upon him by the law. * * *

Courts of last resort in our sister states have frequently found themselves confronted with the same difficulty which we are now considering, where Legislatures have extended the scope of the remedy by quo warranto to include the enforcement of private rights, but have failed to impose by express words a positive duty upon the Attorney General or state's attorney to proceed at the instance of the individual relator, or have failed to provide that the proceeding may be instituted without the co-operation of those officers. It has sometimes been held that the arbitrary discretion of the public prosecutor still exists as at common law, and that if he refuses to lend his name to the proceeding the individual relator is without remedy, even though the refusal of the officer results from political, selfish, or other improper considerations. In other states relief for the relator has been suggested by various methods, not substantially different, so far as the result to be obtained is concerned. [The opinion then cites and quotes from Bank of Mt. Pleasant, 5 Ohio, 250 (1831), State v. Berry, 3 Minn. [Gil.] 190 (1859), State v. Deliesseline, 1 McCord (S. C.) 52 (1821), Lamoreaux v. Attorney General, 89 Mich. 146, 50 N. W. 812 (1891), and Cain v. Brown, 111 Mich. 657, 70 N. W. 337 (1896).]

In People v. Ridgley, 21 Ill. 66, and in People v. Waite, 70 Ill. 26, it was said that our quo warranto statute was a substantial copy of the statute of Anne. The question now before us was not considered by the court in those cases, and they are therefore not in point. The English statute just referred to provides that "it shall and may be lawful to and for" the proper officer, by leave of court, to file or "exhibit" the information (12 Pickering's Stat. at Large, 190), while our

statute provides that the Attorney General or state's attorney "may present a petition" to the court, or the judge thereof, for leave to file the information. The statute of Anne does not expressly require the officer of the crown to file the application for leave, and yet Rex v. Trelawney, 3 Bur. 1616, and Rex v. Wardroper, 4 Bur. 1964, hold that under that statute the officer is without discretion in the matter, but must apply at the instance of the private relator, and that the only discretion is in the court; and in State v. Elliott, 13 Utah, 200, 44 Pac. 248, it was said that "except when changed by statute the rule of procedure is practically the same in this country as in England" under the statute of Anne. * * *

It is, of course, true that in many cases where the individual relator has a private and personal interest in the suit which he seeks to set on foot the public also has a substantial interest therein. No injury can result to the public in such instances, however, by requiring the prosecutor to proceed, for the reason that the court, or the judge thereof, when the petition for leave to file the information is presented, is vested with a sound legal discretion to be exercised in determining whether leave to file the information should be granted, and the court or the judge thereof may, in the exercise of that discretion, fully protect the rights of the public, and may under some circumstances, where the public weal demands, refuse leave to file the information although the clear legal right of the relator is established. McPhail v. People, 160 Ill. 77, 43 N. E. 382, 52 Am. St. Rep. 306. The rights and interests of the public being thus fully protected by a sound legal discretion lodged in the court, or the judge thereof in vacation, it is manifest that there is no occasion for the exercise by the state's attorney or Attorney General of a discretion to be used for the same purpose and for no other purpose.

The discretion possessed by the Attorney General at the common law is no doubt now possessed by the Attorney General or state's attorney in all cases which are, in fact, prosecutions on the part of the people and which involve no individual grievance of the relator. One such case is where the wrong is the usurpation of an appointive public office to which, in the event of judgment of ouster, no particular individual will have a right to succeed; and another example is where the object is to secure a judgment ousting a corporation from the enjoyment of all the franchises which it exercises. In cases, however, where the proposed relator has an individual and personal right, distinct from the right, if any, of the public, which is enforceable by a proceeding in quo warranto, and where he presents to the state's attorney a proper petition for his signature with evidence of the facts necessary to establish the right, it is the duty of that officer to apply for leave to file an information in the nature of a quo warranto, and, if he refuses when the matter is properly presented to him, he may be compelled by mandamus to sign and file the petition for leave.

The practice which may be followed by one who desires to become

relator is to present to the state's attorney a petition addressed to the court, or to the judge thereof in vacation, for leave to file an information in the nature of a quo warranto, which petition should be so drawn as to be ready for filing when the signature of the state's attorney is thereto attached. As was suggested in Cain v. Brown, supra, the affidavit or affidavits accompanying the petition must be full and positive and must be made by a person or persons knowing the facts, and be drawn in such manner as that perjury may be assigned thereon if any material allegation contained therein is false. The affidavit or affidavits accompanying the petition, after being inspected by the state's attorney, should, in case he sign the petition, be presented with it for consideration by the court, or judge thereof, in determining whether to grant the leave asked. The practice pursued by the state's attorney in this case is not a proper one. Upon the petition being presented to him, he caused the actual parties to the controversy, by their attorneys, to appear before him, and heard them on the proposition as to whether he should sign and file the petition. This practice has, we understand, been long pursued in certain counties of this state, and we have no doubt that the public prosecutor of Cook, in this particular instance, proceeded as he did believing in good faith that this practice was the correct one. In our judgment the law of this state does not authorize him in any case to conduct a hearing of this character, and he should not have considered the views of the respondent named in the petition or those of his attorneys. * * *[98]

[98] See People ex rel. Post v. Healy, 231 Ill. 629, 83 N. E. 453 (1908): "Two questions are involved in this case, both of which must be decided in order to determine whether the superior court erred in sustaining the demurrer and dismissing the petition. The first question is whether the appellee, as state's attorney, is possessed of an arbitrary and uncontrolled discretion to file or refuse to file a petition for leave to file an information in the nature of a quo warranto upon the application of an individual having a personal right enforceable by that proceeding; and the second is whether the mayor of the city of Chicago has power to remove from office members of the board of education. If a state's attorney has such discretion, he cannot be coerced by the writ of mandamus; and if the mayor has such power, the writ in this case would not be awarded, for the reason that the object sought would be unattainable and the writ useless. The first question was answered in the case of People ex rel. v. Healy, 230 Ill. 280, 82 N. E. 599, 15 L. R. A. (N. S.) 603. In the consideration and decision of that case we had the valuable aid of the exhaustive briefs and arguments of the counsel in this case, both printed and oral. We gave full consideration, at that time, to every authority and argument presented in this case, and we cannot add anything to that decision by a restatement here of the reasons on which it was based. It was there held that in all cases which are, in fact, prosecutions on the part of the people, involving no personal or individual right, the state's attorney is vested with the same discretion originally exercised by him at the common law, when an information in the nature of a quo warranto was solely a prerogative remedy of the crown; but under our statute, which has enlarged the scope of the remedy for the protection of individual rights, if an individual having a private and personal grievance for which the proceeding is the only remedy shall present a proper petition to the state's attorney, with evidence of the facts necessary to establish his right, it is the duty of such state's attorney to apply for leave to file an information, and if he refuses he may be compelled by mandamus to perform that duty."

SECTION 65.—APPEAL[99]

BOARD OF SUPERVISORS OF BUREAU COUNTY v. CHICAGO, B. & Q. R. Co.

(Supreme Court of Illinois, 1867. 44 Ill. 229.)

Mr. Justice BREESE delivered the opinion of the court.[1] * * *

The appellees, in the attempted performance of the duty enjoined on them by these statutes, presented their list or schedule of their taxable property for 1863, owned by them in Bureau county, to the clerk of the county court, in all respects, as alleged by them, in strict compliance with the statute, which the clerk laid before the board of supervisors when they met to equalize the assessments in that county. This schedule presented an aggregate valuation of $282,383.27 of their property owned in Bureau county, which by the action of the board was increased to $395,336.57, being 40 per cent. above the valuation by the company.

[99] There is no right to appeal from administrative orders to a court, unless given by statute. Brown v. District Council of Narragansett, 21 R. I. 503, 42 Atl. 270, 44 Atl. 932 (1899). See, also, Ohio & Miss. R. Co. v. Lawrence County, 27 Ill. 50 (1861); Karb v. State, 54 Ohio St. 383, 43 N. E. 920 (1896).

A right to appeal was held to exist by implication in Sawyer v. State Board of Health, 125 Mass. 182 (1878). See, now, Rev. Laws Mass. c. 75, § 119, and Nelson v. State Board of Health, 186 Mass. 330, 71 N. E. 693 (1904).

An official power of supervision, etc., involves a right to entertain appeals (Magwire v. Tyler, 1 Black, 195, 202, 17 L. Ed. 137 [1861]), unless negatived by the course of legislation. See Butterworth v. United States, 112 U. S. 50, 5 Sup. Ct. 25, 28 L. Ed. 656 (1884). But as a rule there is no right to appeal from the head of a department to the chief executive. Memorial of Captain Meigs, 9 Ops. Attys. Gen. 462 (1860); Bollman's Case, 10 Ops. Attys. Gen. 526 (1863); Las Animas Grant, 15 Ops. Attys. Gen. 94, 100 (1876).

For a very comprehensive provision, giving a right of appeal, see Comp. St. Neb. 1909, § 7153 (Code Civ. Proc. § 580): "A judgment rendered, or final order made by a probate court, justice of the peace, or any other tribunal, board or officer, exercising judicial functions, and inferior in jurisdiction to the district court, may be reversed, vacated, or modified by the district court."

So, also, there is a general right of appeal from decisions of the boards of county commissioners to the circuit courts in Indiana. See State ex rel. Reynolds v. Board of Com'rs of Tippecanoe County, 45 Ind. 501 (1874).

The General Administrative Act of Prussia (July 30, 1883) provides (section 127): Against police orders of local police authorities, unless expressly otherwise provided by law, there shall lie a remonstrance to [certain specified superior administrative officers]. Against the decision in the last resort of such administrative officers there shall lie an action in the supreme administrative court. The action can be founded only on the allegation: (1) That the contested decision violates the rights of the plaintiff by not applying or by misapplying the existing law or administrative regulations issued by the competent authorities; or (2) that the facts did not exist which would have justified the issuing of the order.

[1] A portion of the opinion only is printed.

Availing of the act of 1861, by which an appeal is allowed to the circuit court from the action of the board of supervisors, the company took an appeal to the circuit court of Bureau county, and, by change of venue, the cause was transferred to La Salle county, in the circuit court of which county, at the March term, 1866, such proceedings were had as resulted in a deduction by that court of the per cent. thus imposed by the board of supervisors, leaving the schedule of the company as originally presented to the county clerk intact.

To reverse this judgment, the county of Bureau bring the case here by appeal, and assign various errors, which we have fully considered.

The first question they make is that the circuit court had no jurisdiction of the appeal, that it was a case not provided for by the fundamental law; and we are referred to that clause of the Constitution conferring judicial power in support of the position. Section 1 of article 5 declares that the judicial power of the state shall be vested in one Supreme Court, in circuit courts, in county courts and in justices of the peace; provided, that inferior local courts of civil and criminal jurisdiction may be established by the General Assembly in the cities of this state, but such courts should have a uniform organization and jurisdiction in such cities. By section 8 of the same article it is provided that there shall be two or more terms of the circuit court held annually in each county of this state, at such times as shall be provided by law; and said courts shall have jurisdiction in all cases at law and equity, and in all cases of appeal from all inferior courts.[2]

It is argued with great force and ability that, inasmuch as the board of supervisors is in no sense a court of any description, an appeal cannot lie to the circuit court from any of its determinations, and consequently the act of 1861, allowing an appeal by a railroad company from their determinations, is unconstitutional and void. Much ingenious, forcible and persuasive argument has been used by appellants here in support of this view, but we are not convinced by it. Even if we had a doubt of the power of the Legislature to make this enactment, we should be constrained, under repeated rulings of this court, to solve the doubt in favor of the Legislature; for this court has declared that it is only in a very clear case, where the violation of the Constitution is plain and palpable, that we will so pronounce. Lucas v. Harris, 20 Ill. 165; People ex rel. v. Auditor, 30 Ill. 434; City of Chicago v. Larned, 34 Ill. 203.

In considering the legislation of this state of a character analogous to this act of 1861, we are by no means convinced of the want of power in the Legislature to allow this appeal. It may be the board of supervisors of a county is not a court in the legal acceptation of that term, but it has power conferred upon it, by the wanton and

[2] The Constitution of 1870 (article 6, § 12) says: "Such appellate jurisdiction as is or may be provided by law."

unjust exercise of which the most vital interests of parties before it may be rendered totally valueless. Perilous indeed would be their condition, if those great interests were at the mercy of irresponsible men, bent, it may be, on inflicting injury for which they could not atone. It is going a great way to say that any act of the Legislature—a co-ordinate department of the government, and whose speciality is the enactment of laws—that any one of their enactments has no foundation in the Constitution, an instrument which the lawmakers are sworn to support, and which we must not suppose they have violated, in the absence of the clearest proof. Hence courts have always approached this subject with great delicacy, and have ever manifested a disposition to sustain the law, in the absence of an entire conviction of its unconstitutionality. This much of respect is certainly due to that department of the government, and this court has always most cheerfully extended it, and ever will.

To insist that a board of supervisors is not a court does not decide the question, as we think. In our legislation, several acts may be found giving an appeal to the circuit court in cases confessedly not originating in the exercise of judicial power by a court, as, for example, in the case of the trial of the right of property by a sheriff's jury. The case of Rowe v. Bowen, 28 Ill. 118, was such a case, in which we held that an appeal lies in many cases not growing out of judicial proceedings, as upon assessments of damages by commissioners for roads, or for city improvements. So, also, in the case of the establishment of a road by commissioners, as was held in the case of County of Peoria v. Harvey, 18 Ill. 364. So, where the statute gives an appeal from an assessment of damages for a right of way. Joliet & Chicago R. R. Co. v. Barrows, 24 Ill. 562. The case of Ohio & Mississippi R. Co. v. County of Lawrence, 27 Ill. 50, occurring before 1861, very distinctly intimates that legislative action was necessary to uphold the appeal, and if that existed the right to appeal was free from doubt. The act of 1861 gives an appeal in express terms.

In view of this legislation, and these judicial decisions, it is too late to urge a want of jurisdiction in the circuit court to try the appeal from the board of supervisors, and we must hold that the jurisdiction was complete under the act of 1861, and that statute is not in conflict with any provision of the Constitution, considered in the light of long-continued analogous legislation under it. In counties not adopting township organization, individual taxpayers had an appeal from the county assessor to the county court, and from that court, through the Auditor of Public Accounts, to the Supreme Court. Scates' Comp. 1040. Railroad companies are entitled to as much favor in this regard as individuals, and we have no difficulty in deciding the circuit court had full jurisdiction of the appeal. * * *

CITY OF AURORA v. SCHOBERLEIN.

(Supreme Court of Illinois, 1907. 230 Ill. 496, 82 N. E. 860.)

Appeal from circuit court, Kane county.

Proceeding by the City of Aurora against Adam Schoberlein, as Fire Marshal. From the judgment, the City appeals. Reversed.

CARTWRIGHT, J.[3] On July 10, 1905, written charges against appellee, fire marshal of the city of Aurora, were presented to the board of fire and police commissioners of said city in pursuance of section 12 of an act entitled "An act to provide for the appointment of a board of fire and police commissioners in all cities of this state having a population of not less than seven thousand nor more than one hundred thousand, and prescribing the powers and duties of such board," in force April 2, 1903. Laws 1903, p. 97. After an investigation, at which appellee was heard in his own defense, the board found him guilty as charged and made an order removing him from office. Within 10 days after the entry of the order appellee filed with the secretary of the board a bond for an appeal to the circuit court of Kane county, in which said city is located, and on November 21, 1905, the secretary transmitted to the court a transcript of the proceedings before the board, in compliance with section 18 (page 100) of said act, which purports to allow an appeal to the circuit court from any order of a board created under the act. The record recites that appellant filed its motion to dismiss the appeal on the ground that section 18 is unconstitutional and void, and the court denied the motion. No bill of exceptions was taken at the time, and there was no extension of time for tendering such a bill.

The appeal was subsequently called for trial before another judge, and the court ordered a trial de novo, against the objection of appellant, and called a jury against like objection. The files of the proceeding consisted of the written charges, the evidence produced before the board, and the order of removal, and the jury were sworn to try the issues joined and a true verdict render according to the evidence. Both parties introduced testimony relating to the charges, and at the conclusion of the evidence the court, on motion of appellee, instructed the jury to find him not guilty. A verdict of not guilty was thereupon returned, and the court entered an order reversing the order of the board removing appellee from office, and ordered the board forthwith to reinstate and re-employ him as fire marshal, and to allow him to perform the duties and services connected with that office and collect the salary and compensation allowed therefor, and also rendered judgment against appellant for costs. From that judgment an appeal was prosecuted to this court, and among other assignments of error is one that the circuit court had

[3] Only a portion of the opinion of Cartwright, J., is printed.

no jurisdiction of the subject-matter, and that section 18 of said act authorizing an appeal is unconstitutional and void. * * *

The board of fire and police commissioners of the city of Aurora is a branch of the executive department of the city government, and all the acts and powers of the board are purely ministerial or executive. The Legislature could not confer upon the board any judicial power whatever. By article 3 of the Constitution the powers of the government are divided into three distinct departments, the legislative, executive, and judicial, and it is provided that no person or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others, except as thereinafter expressly directed or permitted. By section 1 of article 6 the judicial powers are vested in certain courts, and a board of fire and police commissioners cannot assume or exercise any part of the judicial power. George v. People, 167 Ill. 447, 47 N. E. 741. Neither does the act purport to give to such boards any judicial power. They are authorized by statute to remove an officer for cause, after a hearing and an opportunity to make a defense, and that authority implies the power to judge of the existence and sufficiency of the cause; but there is no such thing as title or property in a public office, and the removal of an officer is not the exercise of judicial power. Donahue v. Will County, 100 Ill. 94; Stern v. People, 102 Ill. 540. No right of life, liberty, or property was involved or adjudicated before the board in this case. Although the exercise of the power of removal involved judgment and discretion, it was not a judicial act. It has been said that where an act is the result of judgment and discretion and a decision upon the facts it is of a judicial nature; but there is a clear distinction between such acts and the exercise of judicial power which adjudicates upon and protects the rights and interests of individuals and to that end construes and applies the law.

An appeal is a step in a judicial proceeding, and in legal contemplation there can be no appeal where there has been no decision by a judicial tribunal. Two things are essential to an appeal, in its proper sense: First, the decision of a judicial tribunal; and, second, a superior court invested with authority to review the decision of the inferior tribunal. Elliott on Appellate Procedure, § 15. There have been cases where the jurisdiction of courts has been sustained in what were called appeals from inferior bodies having nonjudicial powers, such as the case of establishing a road by commissioners involving an appraisement of damages (County of Peoria v. Harvey, 18 Ill. 364), or an assessment of damages for a right of way (Joliet & Chicago Railroad Co. v. Barrows, 24 Ill. 562), or the trial of a right to property levied upon and claimed by a third party before a sheriff and jury (Rowe v. Bowen, 28 Ill. 116), or an assessment of property for taxation (Bureau County v. Chicago, Burlington &

Quincy Railroad Co., 44 Ill. 229). The nature of such proceedings was explained in the case of Maxwell v. People, 189 Ill. 546, 59 N. E. 1101, where it was held that there can be no such thing as an appeal, in a legal sense, from a nonjudicial body to a court. It was said that appellate jurisdiction is the attribute of a court created for reviewing the decisions of inferior courts and not of inferior bodies nonjudicial in character, citing People v. Cook Circuit Court, 169 Ill. 201, 48 N. E. 717, and it was held that this court takes jurisdiction of what is called an appeal in cases relating to the revenue, in the exercise of its original jurisdiction conferred by the Constitution. If a controversy belongs to a class of cases of which a court has original jurisdiction, and it is brought before the court in the method prescribed by the Legislature, the court may take jurisdiction by virtue of its general powers; but so far as the remedy is judicial it begins with a presentation of the case to the court.

The cases in which appeals from nonjudicial bodies to courts have been recognized have involved individual or property rights of which the court had jurisdiction under some other form of procedure, and belonged to classes of cases in which the court, acting judicially, could afford a remedy. This proceeding is not of that character. The section in question purports to authorize an appeal from any order of the board by any person interested or affected, and if it should be sustained it would result in the circuit courts assuming and exercising executive powers. They would practically control the appointment and removal of members of fire departments in the cities of this state to which the act applies, by the exercise of judgment and discretion as to fitness and qualifications of individuals for positions in such departments, and not by adjudicating rights or applying the rules of law. That would be the exercise of executive powers, which the separation of departments of the government precludes the court from exercising.

The fact that courts have jurisdiction to issue the common-law writ of certiorari to determine whether inferior bodies have acquired jurisdiction to act and have proceeded according to law can have no influence upon the question here involved. The courts do not, by virtue of that writ, review the decisions of the inferior bodies or determine the facts. It has been held competent for the Legislature to confer on persons holding judicial offices the power to appoint officers whose selection or appointment cannot be classed as belonging to either of the departments of government (People v. Morgan, 90 Ill. 558; People v. Hoffman, 116 Ill. 587, 5 N. E. 596, 8 N. E. 788, 56 Am. Rep. 793); but we do not think there can be any doubt that officers of a fire department belong to the executive branch of the government.

Section 18, which purports to authorize an appeal to the circuit court from any order of a board of fire and police commissioners, is

unconstitutional and void, and the judgment of the circuit court is reversed.

Judgment reversed.[4]

THOMPSON et al. v. KOCH.

(Court of Appeals of Kentucky, 1895. 98 Ky. 400, 33 S. W. 96.)

Application of August Koch to R. H. Thompson and others, constituting a license board, for a liquor license. The license was refused, and applicant appealed to the circuit court, which granted the license, from whose judgment the board appeals. Reversed.

PRYOR, C. J. Under the provisions of the statute for the government of cities of the first class in reference to the retailing of spirituous liquors, it is provided: "The judge of the city court, the chairman of the board of public safety, and the president of the commissioners of the sinking fund, are constituted a license board, the judge of the city court to be the chairman, and the secretary of the sinking fund shall be ex officio secretary." St. Ky. § 3030.

Section 3031 defines the manner in which the application for a license shall be made, and the qualifications of the applicant. Section 3033 provides that no license shall be granted to any person who has not the qualifications prescribed in section 3031, and further provides: "No license shall be granted to retail liquor in any precinct, if in the opinion of the board, the retailing of liquor at the place named will be injurious to the people thereof, or if a majority of the voters of the precinct registered at the last annual registration remonstrate against the granting of the same." An appeal may be had to the circuit court, as is provided in the following section.

The section following, which is section 3034, provides: "Any license granted by said board may be revoked by it, after an open trial with due notice to the licensee, whenever in the judgment of said board, the licensee has conducted a disorderly house, or violated the law with respect to the sale of liquor, and either party who shall feel aggrieved by the decision of the board may have an appeal to the circuit court."

It is conceded the power to grant the license is with this license board, and, from the express language of the statute, the board, in its

[4] In Sangamon County v. Brown, 13 Ill. 207 (1851), it was held, where the statute gave an appeal from the decision of the county court in highway proceedings to the circuit court, the case to be acted upon in such manner as the court may determine, with a view to justice and the establishment of the road, that the only question to be reviewed, if the county court acquired jurisdiction and proceeded regularly, was the amount of damages, and that the question whether the public interests demanded the construction of the road was a matter resting in the sound discretion of the county court, with which the circuit court had nothing to do.

See, also, Board of Commissioners of Vigo County v. Davis, 136 Ind. 503, 36 N. E. 141, 22 L. R. A. 515 (1894).

discretion, may refuse the license when, in the opinion of its members, the retailing of liquor will be injurious to the people of the precinct in which the liquor is proposed to be sold, or when a majority of the registered voters in the precinct at the last annual registration remonstrated against the granting of this privilege to the applicant. The board, constituted as the statute requires, heard the testimony for and against the applicant in this case, and refused to grant the license. An appeal was taken to the circuit court, and there the case heard de novo, and a judgment entered granting the license, and from that judgment an appeal has been taken to this court.

It is insisted, by counsel for the applicant that no appeal lies from the judgment below to this court; that the board of license is merely advisory, is at best a tribunal with special and limited power, and cannot in any sense be deemed a court, because the present constitution expressly prohibits the lawmaking power from creating any other courts than those mentioned in that instrument. We perceive no objection to that character of legislation requiring or granting appeals from the judgments of boards of cities and towns, whether of the one class or the other, where those boards are vested with the power of hearing and determining questions, affecting the rights of the citizen, that pertain to the particular municipality in which those rights are asserted or denied. The power to grant licenses must be vested in somebody connected with or created for the purposes of municipal government, and, besides, this appeal comes from the circuit court, and its judgments are subject to the revisory power of this court, unless prohibited by law. An appeal lies to this court from the judgments of circuit courts in all cases other than those excepted by the statute. This law of license is a general law, applicable to all cities of the first class; and, the circuit court entertaining jurisdiction of the appeal, the right of appeal to this court is unquestioned, as it is not within any of the exceptions to the statute in which this court is denied appellate jurisdiction.

Counsel for the appellant insists that the circuit court had no power to reverse the judgment of the board rejecting the license, because that tribunal was invested with the discretionary power of granting or refusing such applications, and to take this discretion from the board, and place it with the judge of the circuit court, was never contemplated by the legislature. While it is not necessary to determine this question, it seems to us clear that, when such discretion is confided to certain boards, for the purposes of municipal government, and an appeal allowed, it should appear that the judgment of the board was the exercise of an arbitrary discretion before the circuit court would disregard its judgment, and therefore the circuit court should have before it the testimony upon which the board acted; for, otherwise, this discretion would be taken from those constituting the board, and confided alone to the circuit court. If the case is to be heard de novo, then the applicant, instead of seeking the judgment of the board

as to his qualifications, and the necessity for granting the license could decline to introduce his testimony, and submit to a judgment against him, and, by an appeal to another tribunal, deprive the municipality of the judgment of those selected by law to pass upon such questions.

When, therefore, this discretion is confided to certain boards, the facts upon which their action was based should go to the circuit court, in order to enable that court to determine whether or not the judgment of the board was an exercise of arbitrary power. If this mode of practice is not to be adopted, and we think this discretionary power cannot exist without it, then it appears, from the testimony heard below, that a decision might well have been rendered for either party; and, assuming the board acted alone upon the testimony heard by the circuit judge, still there was nothing to show that any arbitrary action was taken by the board, and for that reason, if no other, the judgment should have been affirmed.

The judgment of the circuit court is therefore reversed, with directions to dismiss the appeal taken from the license board.[5]

[5] See Hopson's Appeal, 65 Conn. 140, 31 Atl. 531 (1894): "The act of 1893, in permitting an appeal from the decisions of county commissioners to the superior court, called into action a judicial function for dealing with such appeal; but it did not alter the actual nature or extent of the power originally vested in the county commissioners for the selection of proper persons and proper places for the sale of liquors. The discretion necessary to the exercise of that power by the county commissioners is, by the appeal, transferred to the judge of the superior court; but there is nothing in the act which can be construed as attempting to vest in this [the Supreme] court the final exercise of that discretion, or the control of its exercise by a judge of the superior court. In dealing with such appeal the superior court is bound by the rules of law regulating the conditions on which the discretionary power of selection shall be exercised, such as the meaning and effect of the language of the regulating statutes, and the acts required by statutory regulations in order to permit any action on the original application or the appeal. The court is also bound by those fundamental rules of law that control all exercise of judicial, or quasi judicial, power. It may not, for instance, arbitrarily refuse to hear any evidence, or to listen to a person entitled to be heard. The failure of the court to comply with such rules may be error, which this court upon appeal will correct. But in exercising the duty of determining a suitable person and a suitable place for the sale of liquors, imposed on the county commissioners, and, by force of the appeal, transferred unchanged in its nature and extent to a judge of the superior court, the judge is engaged in settling a matter of discretion. In this case, certainly, the court was not engaged in the trial of 'matters of fact in any cause or action,' within the meaning of the statute regulating appeals to this court."

In Norwalk Street Railway Company's Appeal, 69 Conn. 576, 596, 37 Atl. 1080, 1087, 39 L. R. A. 794 (1897), the court said: "In Hopson's Appeal, 65 Conn. 140, 31 Atl. 531 (1894), we held that the selection or appointment of such a licensee was a means apparently appropriate both to the exercise of executive and judicial power; that the uniform practice of courts and Legislature in so treating such appointment might be safely accepted when the distinction to be drawn must be subtle and doubtful."

Further, in Norwalk Street Railway Company's Appeal, 69 Conn. 576, 37 Atl. 1080, 39 L. R. A. 794 (1897): "The act of 1893 confers upon city councils certain powers in establishing regulations for the location, construction, and operation of street railways, and requires a council, if requested by a

STATE ex rel. SERES v. DISTRICT COURT OF FIRST JUDICIAL DISTRICT.

(Supreme Court of Montana, 1897. 19 Mont. 501, 48 Pac. 1104.)

Application of the State of Montana, on the relation of J. R. Seres, for mandamus against the District Court of the First Judicial District of the state of Montana in and for the county of Lewis and Clarke. Writ awarded.

This is an application for a writ of mandamus. The petitioner alleges that he is a regular graduate of an accredited college of medicine; that he attended at least four courses of lectures at said college, of six months each; that on the first Tuesday of October, 1896, petitioner was an applicant to the board of medical examiners for a certificate entitling him to practice medicine and surgery in the state of Montana; that a meeting of said board was held in Helena on the day aforesaid; that at said meeting the petitioner presented his diploma from said medical college, evincing his graduation; that said diploma was found by the said board of examiners to be genuine, and issued by a regular medical college, legally organized and in good standing; that he thereupon submitted to an examination in the various branches prescribed by law and the said board of examiners, and filed with the said board his examination papers, written upon the questions by the said board propounded in the said various branches; that thereupon said board denied the petitioner's application for a certificate to practice medicine and surgery in the state of Montana upon the ground that said examination papers showed that the petitioner had not the requisite learning to entitle him to such certificate; that, after being notified by said board of its determination not to grant this petitioner such certificate, he within 30 days duly appealed from the decision of the said board of medical examiners to the district court of the First judicial district of the state of Montana in and for the county of Lewis and Clarke; and that, after said appeal was duly taken to the district

railway company, to take some action within sixty days, and to notify the company in writing of its action. Whenever a council fails to give such written notice, the act of 1895 confers the same powers upon the 'superior court or any judge thereof,' to be exercised on application of a railway company, and calls this application an 'appeal.' * * * The so-called 'appeal' in this case is not a process to invoke the judicial power. It is simply an application to the superior court to exercise a legislative function. * * * We cannot recognize such a right, because the recognition leads inevitably to the obliteration of any line of separation between the judicial and other departments of the government."

See New York Railroad Law, § 94.

See, also, Appeal of Spencer, 78 Conn. 301, 61 Atl. 1010 (1905); Tyson v. Washington Co., 78 Neb. 211, 110 N. W. 634, 12 L. R. A. (N. S.) 350 (1907).

As to appeals from administrative action concerning questions of right, see United States v. Duell, 172 U. S. 576, 19 Sup. Ct. 286, 43 L. Ed. 559 (1899).

court, the said district court, on the motion of the county attorney of the said county and the Attorney General of the state, dismissed the petitioner's appeal, upon the ground that the said court had no jurisdiction to try and determine the same.

The petitioner asks for a writ of mandate in this proceeding, commanding the district court to reinstate his appeal and to proceed to the hearing and determination thereof. On the return of the writ, the Attorney General, for the said district court, demurred to the petition for the reasons—First, that said petition does not state facts sufficient to entitle said petitioner to the relief prayed for; and, second, that said petition shows affirmatively that the action of the medical board in refusing to issue a certificate for the cause specified was final, and not subject to review by any appellate tribunal, and that said defendant (district court), in dismissing said petition, acted correctly and within its jurisdiction, in that no appeal lay from the action of the board to said defendant.

PEMBERTON, C. J. (after stating the facts). The only question presented here is this: Does the statute allow an appeal to an applicant who has been refused a certificate by the medical board authorizing him to practice medicine and surgery in this state on the ground that the applicant's examination papers show that he has not the requisite learning to entitle him to such certificate?

Counsel for the defendant, the Attorney General, contends that the right of appeal exists only when the certificate is refused or revoked by the board for unprofessional, dishonorable, or immoral conduct, and that no appeal lies from the refusal of the board to issue a certificate on the ground of the incompetency of the applicant.

That part of section 603, Pol. Code, which provides for appeals from the action of the medical board is as follows: "In all cases of the refusal or revocation of a certificate to practice medicine by the said board, the person aggrieved thereby may appeal from the decision of the board to the district court of the county in which such revocation or refusal was made."

Counsel for defendant contends that this provision only gives the right of appeal where the certificate is refused or revoked by the board for unprofessional, dishonorable, or immoral conduct, and that State v. District Court of First Judicial District, 13 Mont. 370, 34 Pac. 298, in which this court discussed the right of appeal from the action of the medical board, does not go to the extent of deciding that an appeal lies in cases like the one at bar.

But, in examining our statute, we find no language that restricts the right of appeal to any particular class of cases. The terms of the statute are general, and give the right of appeal "in all cases of the refusal or revocation of a certificate to practice medicine by the said board." A number of the states have statutes like ours, but we are not referred to any decision of any of the states where the precise question here involved has been adjudicated and determined.

The law provides that appeals in such cases shall be conducted like appeals from a decision of a board of county commissioners disallowing a claim. Pol. Code, § 603. Appeals from actions of boards of county commissioners are prosecuted and tried like appeals from a justice of the peace. Id. § 4289. Appeals from a justice court are tried de novo.

It is said by counsel for the defendant that a trial of this case de novo in the district court would be impracticable, if not impossible; that the court or jury could not try and determine the question of petitioner's competency to practice medicine. It is further insisted that the law does not provide any procedure by which the district court could properly try and determine this question.

In State v. District Court of First Judicial District, supra, this court held that the right of appeal was not rendered nugatory because the law did not prescribe rules to guide the district court in trying such appeal. This was when there were no proceedings or rules prescribed by law for appeals in such cases. The present statutes do prescribe the manner of appeal, and, if the proceedings prescribed by the statute are inefficient, under the provision of section 205, Code Civ. Proc., "any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the Code." Awkward, difficult, and unsatisfactory as a trial of this case in the district court might, and doubtless would, be, we are of the opinion that the learned district judge would be able to devise ways and means not incompatible with the Code for disposing of the case.

Impolitic and unwise as this law may be, still, if the Legislature has given the petitioner the right of appeal in this case, we have neither the right nor disposition to deprive him of its exercise by any unauthorized construction of the statute or by any apparent judicial legislation. Unless we construe or legislate something very material into the statute not placed there by the Legislature, we think the petitioner, under the law, which is broad and general in its terms, is entitled to prosecute his appeal in this case. Whether or not such laws are wise or unwise, politic or impolitic, are questions for the legislative branch of the government, and we have no right or inclination to invade that domain.

The order of the district court dismissing the appeal in this case is reversed, and a peremptory writ of mandate is ordered to issue, directing that the district court reinstate said appeal and proceed to the trial of the cause.

Reversed.

BUCK, J., dissents.[6]

[6] The concurring opinion of Hunt, J., is omitted.

See Laws Mont. 1907, c. 100, providing for a trial of appeals by a jury of six physicians.

Compare Raaf v. State Board of Medicial Examiners, 11 Idaho, 707, 84 Pac. 33 (1906); also Munk v. Frink, 75 Neb. 172, 106 N. W. 425 (1905).

As to whether the provision by statute for an appeal excludes other reme-

SECTION 66.—DEFENSE TO ENFORCEMENT PROCEEDINGS

This is a very common method of testing the legality of administrative action, illustrated by numerous cases in this collection. See the following: Galbraith v. Littiech, 73 Ill. 209 (1874); Nealy v. Brown, 6 Ill. 10 (1844); State v. Weimer, 64 Iowa, 243, 20 N. W. 171 (1884); People v. Hopson, 1 Denio (N. Y.) 574 (1845); Hagar v. Reclamation District, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569 (1884); Waye v. Thompson, L. R. 15 Q. B. 342 (1885); Philadelphia v. Scott, 81 Pa. 80, 22 Am. Rep. 738 (1876); Metropolitan Board of Health v. Heister, 37 N. Y. 661 (1868); Health Department v. Trinity Church, 145 N. Y. 32, 39 N. E. 833, 27 L. R. A. 710, 45 Am. St. Rep. 579 (1895); Salem v. Eastern Railroad Co., 98 Mass. 431, 96 Am. Dec. 650 (1868); Com. v. Sisson, 189 Mass. 247, 75 N. E. 619, 1 L. R. A. (N. S.) 752, 109 Am. St. Rep. 630 (1905); Com. v. Kinsley, 133 Mass. 578 (1882); Martin v. State, 23 Neb. 371, 36 N. W. 554 (1888); King v. Venables, 2 Ld. Raym. 405 (1725); People v. McCoy, 125 Ill. 289, 17 N. E. 786 (1888); State v. Lamos, 26 Me. 258 (1846); Hutton v. Camden, 39 N. J. Law, 122, 23 Am. Rep. 203 (1876); State v. Kansas Central R. Co., 47 Kan. 497, 28 Pac. 208 (1891); Interstate Commerce Commission v. Cincinnati, etc., R. Co., 167 U. S. 479, 17 Sup. Ct. 896, 42 L. Ed. 243 (1897); Wilson v. Eureka City, 173 U. S. 32, 19 Sup. Ct. 317, 43 L. Ed. 603 (1899); McLean v. Jephson, 123 N. Y. 142, 25 N. E. 409, 9 L. R. A. 493 (1890); Harrington v. Glidden, 179 Mass. 486, 61 N. E. 54, 94 Am. St. Rep. 613 (1901); Fire Department v. Gilmour, 149 N. Y. 453, 44 N. E. 177, 52 Am. St. Rep. 748 (1896); Spencer & Gardner v. People, 68 Ill. 510 (1873); Interstate Commerce Commission v. Alabama Midland R. Co., 168 U. S. 144, 18 Sup. Ct. 45, 42 L. Ed. 414 (1897).

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dies, and especially also whether it prevents defects of administrative action to be availed of by way of defense to proceedings brought on behalf of the public against the individual, see Governors of Bristol Poor v. Wait, 1 Ad. & El. 264 (1834); Allen v. Sharp, 2 Exch. 352 (1848); Clinkenbeard v. United States, 21 Wall. 65, 22 L. Ed. 477 (1874).

See, for application of statutory right of appeal, the following cases in this collection: Gross' License, 161 Pa. 344, 29 Atl. 25 (1894); Whitely v. Platte Co., 73 Mo. 30 (1880); Fuller v. Colfax Co. (C. C.) 14 Fed. 177 (1882); Lillienfeld's Case, 92 Va. 818, 23 S. E. 882 (1896); Gilbert v. Columbia Turnpike Co., 3 Johns. Cas. (N. Y.) 107 (1799).

CHAPTER IX

JURISDICTION, CONCLUSIVENESS, AND JUDICIAL CONTROL

SECTION 67.—IN GENERAL

STATE ex rel. COOK v. HOUSER.

(Supreme Court of Wisconsin, 1904. 122 Wis. 534, 559, 100 N. W. 964, 971.)

MARSHALL, J.[1] * * * Whatever privileges are within the power of the Legislature to grant may be granted upon such conditions and subject to such regulations as it in its wisdom may see fit to impose. That is elementary. In dealing with this subject care should be exercised to distinguish between common-law rights, which are within the protection of constitutional restraints upon legislative authority, and mere legislative creations. A failure in that regard would be quite likely to lead one astray. The right to vote and to secrecy in respect to the elector's opinion thus expressed cannot be impaired, but the enjoyment of those rights which are within constitutional protection may have every legislative aid which the wisdom of the lawmaking power may see fit to afford. The power of regulation to that end is limited only by what is reasonable. Any attempt to regulate passing that barrier is destructive of the right involved, not an aid to its enjoyment, and hence is not legitimate. * * *

So the plan for an official ballot, and opportunity for party representation thereon, are matter of legitimate legislative creation; hence the conditions of party representation upon such ballot are purely within legislative control. Whoever joins a political party impliedly submits to regulations in that regard, as in effect by-laws of the organization, the same as every member of any other voluntary association, upon joining the same, irrevocably pledges himself to be bound by the decisions of its tribunals, save as regards jurisdictional errors. This court very recently dealt with such relations in Bartlett v. L. Bartlett & Son Co., 116 Wis. 450, 93 N. W. 473, and Wood v. Chamber of Commerce, 119 Wis. 367, 96 N. W. 835.

Errors of judgment committed by such a tribunal, however numerous or serious, even though by reason thereof justice, except as regards mere form, be denied and wrong from an original standpoint be made to bear the stamp of right, does not militate at all

[1] Only a portion of the opinion of Marshall, J., is printed.

against the binding effect of the result. All must bow to it as the right of the matter from a legal standpoint, however much from a moral aspect it may appear to be wrong. That applies to all tribunals of voluntary organizations and to all special tribunals created by law to deal with legislative rights and privileges. There are so many illustrations of approved legislation as regards the latter that it is strange that a layman, even, should marvel at the existence of such laws, and passing strange that others should. There are hundreds of such tribunals. Every board of review, every one of the numerous official boards and councils empowered to act judicially, is such a one. Who would expect to avoid the decision of a board of review, or the board of law examiners, or the board of control, or the board of regents, or the board of dental examiners, as to any matter within its jurisdiction, except for errors of a jurisdictional character? The books are full of decisions in harmony with what is here suggested. The following are examples: State ex rel. Coffey v. Chittenden, 112 Wis. 569, 88 N. W. 587; State ex rel. Vilas v. Wharton, 117 Wis. 558, 94 N. W. 359; State ex rel. Augusta v. Losby, 115 Wis. 57, 90 N. W. 188; State ex rel. Heller v. Lawler, 103 Wis. 460, 79 N. W. 777; State ex rel. N. C. Foster Lumber Co. v. Williams, 123 Wis. 61, 100 N. W. 1048, and State ex rel. Gray v. Common Council, 104 Wis. 622, 80 N. W. 942. * * *

SECTION 68.—POLICE POWER—JURISDICTIONAL PREREQUISITES

WARNE v. VARLEY et al.

(Court of King's Bench, 1795. 6 Durn. & E. 443.)

To an action of trespass for taking the plaintiff's goods (leather) and detaining them eighteen days, the defendants pleaded a justification under St. 2 Jac. I, c. 22, in which, after alleging that they were duly appointed according to the act to view and search all tanned hides, skins or leather that should be brought to Leadenhall Market and sworn to execute their office truly, and that Varley was also appointed a sealer under the act, they stated that the plaintiff, a tanner, on the 25th of November, 1795, offered for sale in Leadenhall Market the goods in question, which "had not after the tanning thereof been well and thoroughly dried in the judgment of the defendants according to the true intent and meaning of the said act of Parliament, wherefore the defendants by virtue of their office seized and carried away the said goods, and detained them in their

custody until they might be duly tried in manner and form as is directed by the said statute, etc., and that within a reasonable and convenient time after the said seizure, to wit, on the 28th of November, the defendants gave notice of the seizure to the Lord Mayor of London, in order that triers might be appointed for trying the same according to the directions of the said act, etc.

The plaintiff replied that the said skins, after the tanning thereof and before they were put up to sale, had been well and thoroughly dried according to the true intent and meaning of the said act, and that after the seizure they were duly tried by six persons (naming them) duly appointed by the Lord Mayor to be triers, who upon their oaths determined that the leather had been well and thoroughly dried after the tanning according to the true intent and meaning of the act, and that the leather was afterwards restored to him.

Lord KENYON, C. J. I should have been glad to have found some ground on which the defendants' justification could have been supported, because they appear to have acted fairly and bona fide; but after comparing the pleadings with the act of Parliament, it is impossible to decide in their favor. This act was made early in the time of James the First, when the trade of this country was in its infancy, and in a reign during which, notwithstanding what wits have said concerning the pedantry of the monarch, more wholesome acts of Parliament were made for the benefit of the trade of the country than in any subsequent period of the same duration. But this furnishes one of many examples that the wisest legislature in making a law do not forsee every possible case that may happen. I have no doubt but that, if the case in question had occurred to their minds when they framed this law, they would have provided for it. But, sitting in a court of law, we are bound to decide on the act of Parliament as we find it, and are not at liberty to introduce into it any regulations, however wise and proper they may appear to us. This statute, after directing that searchers shall be appointed, authorizes them to seize leather of a certain description, and to submit it to the future inquiry of the triers. It seems reasonable that, if these searchers exercise their authority bona fide, and only seize such leather for the examination of the triers as in their judgment ought to be examined, they should be protected; in such a case they do not transgress any moral duty, and I should have been glad to find that they had not transgressed any legal duty. But the act of Parliament affords them no such protection. It only empowers them to seize leather which is not dried, etc., according to the true intent and meaning of the act. Here the plea does not allege that the leather was insufficiently dried; and the replication does state expressly that it was sufficiently dried, etc., according to the true intent and meaning of this act. Therefore it appears on the record that the defendants seized leather which the statute did not authorize them to seize.

This case does not differ in principle from those alluded to of custom-house and excise officers. In those cases which more frequently occur, the legislature have gradually introduced new laws as the occasion called for them. Custom-house officers were, until a late act of Parliament (19 Geo. II, c. 34, § 16) was passed to protect them, liable to an action for seizing goods, if it ultimately turned out that the goods were not the subject-matter of seizure, even though there was a probable cause for seizing them. Excise officers continued in this situation to a later time, upon a supposition (I believe) that the statute respecting custom-house officers extended to them; and when it was discovered that they were not protected by the former act, the legislature made a similar law (23 Geo. III, c. 70, § 29) for their protection. So in the cases of justices of the peace (7 Jac. I, c. 3, 21 Jac. I, c. 12, and 4 Geo. II, c. 44) and constables the legislature have made laws in their favor when acting in the execution of their office. All these instances show the propriety of protecting persons acting under this act of Parliament when they act bona fide; but the legislature not having given them any protection except when they seize leather of a certain description, the only question is whether the leather in question was or was not the subject of seizure; and that question is against the defendants by their own admission.

On the other point made at the bar, I am at a loss how to state a question about it. The injury done to the plaintiff is by the immediate act of the defendants, and not a consequence arising from some other act; for this trespass is the proper remedy. The authorities cited on behalf of the plaintiff show this. We are therefore bound to give judgment against the defendants.

ASHHURST, J. This seems to be a harsh proceeding against the defendants. They are bound to act under the terrors of a penalty, and it is hard that they should be liable in an action of trespass for a mere error in judgment; but the legislature have not provided for such a case. The act of Parliament only authorizes the searchers to seize goods of a certain denomination; the goods in question are not of that description; therefore the seizure is illegal, and consequently the defendants are trespassers.[2]

[2] See Thompson v. Farrer, 9 Q. B. D. 372, 384 (1882), per Cotton, L. J.: "The construction of the sixth section of the Merchant Shipping Act, 1876, is open to some difficulty. It has been contended that the vessel being in fact unsafe is a condition precedent to the exercise of all the powers given by the section. But this cannot, in my opinion, be the true meaning of the earlier part of the section which gives rise to this argument. For if this is the true construction, a vessel could not lawfully be detained, even for the purpose of being surveyed, unless she is in fact unsafe. This is inconsistent with the first subdivision, which expressly gives power to detain provisionally if the Board of Trade have reason to believe the ship is unsafe, and the contention is inconsistent with the first part of the section itself, which assumes that a ship coming under the provisions of this part of the section may be released, which in the case of a ship in fact unsafe would not be right. The section is not very correctly framed, but I think its meaning is

THE QUEEN v. WOOD.

(Court of Queen's Bench, 1855. 5 El. & Bl. 49.)

Phipson, on an earlier day in this term, obtained a rule nisi for a certiorari to remove the conviction of Mary Wood, after mentioned.

It appeared by affidavit that the Local Board of Health of Burslem, Staffordshire, established under the Public Health Act, 1848 (11 & 12 Vict. c. 63.), passed a by-law in the words following: "All occupiers of any premises within the district shall properly cleanse and remove all snow, or other obstructions, from the footpath and channel opposite their respective premises, before nine of the clock in the forenoon of each day."

Mary Wood, widow, the occupier of a mansion house and grounds surrounding the same, within the Burslem district, was summoned on the information of Thomas Povey, inspector of nuisances to the board, for breach of this by-law. On the return of the summons, her attorney admitted the breach of the by-law, by Mrs. Wood having neglected to clear some snow from the footpath and channel opposite to her house. No other obstruction was complained of. Mrs. Wood's attorney contended that the by-law was illegal. The magistrate, Thomas Bailey Rose, Esq., declined entering into this question, stating that, as the by-law had been allowed, it was his duty to carry it into effect; and he accordingly convicted Mrs. Wood.

Lord CAMPBELL, C. J.[3] If the justice had heard the argument against the validity of the by-law, a difficulty might perhaps have arisen. But he did not do so; he held himself bound to act upon the by-law whether or not it was ultra vires of the Local Board to

that a ship which the Board of Trade have reason to believe to be unsafe may be detained, and after such investigation or inquiry as by the section is binding on the owner, either released or finally detained. The first part of the section in my opinion sums up, though not very accurately, the subsequent detailed provisions of the section. But though as a matter of public policy it was thought right that a power should be given to the Board of Trade to detain provisionally ships reasonably believed by the board to be unsafe, it was obvious that this might produce great hardship to owners of some vessels, and the tenth section gives in certain cases to owners of vessels which have been detained, and which in fact are not unsafe, compensation by way of damages for their detention, this compensation being payable, not by the officers of the board, but by the state out of the public purse."

The relevant portions of the act read as follows:

"6. Where a British ship, being in any port of the United Kingdom, is by reason of the defective condition of her hull, equipments, or machinery, or by reason of overloading or improper loading, unfit to proceed to sea without serious danger to human life, having regard to the nature of the service for which she is intended, any such ship (hereinafter referred to as 'unsafe') may be provisionally detained for the purpose of being surveyed and either finally detained or released as follows: (1) The Board of Trade, if they have reason to believe, on complaint or otherwise, that a British ship is unsafe, may provisionally order the detention of the ship for the purpose of being surveyed."

[3] Only a portion of the opinion of Lord Campbell, C. J., is printed.

make such a by-law, inasmuch as it had been allowed under section 115. We think that, if the Local Board exceeded their powers in making the by-law, the justice exceeded his power in convicting, and that a certiorari may go, it being open to us to inquire as to the validity of the by-law. It would be monstrous to say that the allowance by the Secretary of State precludes such an inquiry. No power is given to him to legislate; he can only confer authority on a by-law made conformably to the statute. * * *

ERLE, J. It is clear that, though the certiorari is taken away, there is an exception in the case where there is no jurisdiction. The question, therefore, is whether the by-law is good. Have the board, under section 55, any authority to remove all snow?[4] According to my opinion, they have not. Their power, as has been clearly pointed out by my Lord, is confined to things in the nature of manure. As to the general argument from expediency, it would, in my opinion, have been expedient to give a general power to remove snow: but it is not done. With respect to the jurisdiction of the magistrate, the case of Regina v. Bolton, 1 Q. B. 66, lays down the proper test. If the magistrate had no power to enter into the inquiry, we can correct what has been done. But, had the by-law been confined to "filth," and the magistrate had decided that snow was filth, we must, I think, have held the conviction good.[5]

MILLER v. HORTON et al.

(Supreme Judicial Court of Massachusetts, 1891. 152 Mass. 540, 26 N. E. 100, 10 L. R. A. 116, 23 Am. St. Rep. 850.)

Exceptions from superior court, Bristol county.

HOLMES, J. This is an action of tort for killing the plaintiff's horse. The defendants admit the killing, but justify as members of the board of health of the town of Rehoboth, under an order addressed to the board and signed by two of the three commissioners of contagious diseases among domestic animals, appointed under St. 1885, c. 378, and acting under the alleged authority of St. 1887, c. 252, § 13. This order declared that it was adjudged that the horse had the glanders, and that it was condemned, and directed the defendants to cause it to be killed. The judge before whom the case was tried found that the horse had not the glanders, but declined to rule that the defendants had failed to make out their justification, and found for the defendants. The plaintiff excepted.

[4] The section gives power to make by-laws for the removal of "all dust, ashes, rubbish, filth, manure, dung, and soil."

[5] As to this last point, see Brittain v. Kinnaird, 1 Br. & B. 432 (1819); Mould v. Williams, 5 Q. B. 469 (1844); Calder v. Halket, 3 Moore P. C. 28 (1839). See, also, Queen v. Rose, 24 L. J. Mag. Cas. 130 (1855).

The language of the material part of section 13 of the act of 1887 is: "In all cases of farcy or glanders the commissioners, having condemned the animal infected therewith, shall cause such animal to be killed without an appraisal, but may pay the owner, or any other person, an equitable sum for the killing and burial thereof." Taken literally, these words only give the commissioners jurisdiction and power to condemn a horse that really has the glanders. The question is whether they go further by implication, so that, if a horse which has not the disease is condemned by the commissioners, their order will protect the man who kills it, in a subsequent suit by the owner for compensation.

The main ground for reading into the statute an intent to make the commissioners' order an absolute protection is that there is no provision for compensation to the owner in this class of cases, and, therefore, unless the order is a protection, those who carry it out will do so at their peril. Such a construction, when once known, would be apt to destroy the efficiency of the clause, as few people could be found to carry out orders on these terms.

On the other hand, this same absence of any provision for compensation to the owner, even if not plainly founded on the assumption that only a worthless animal, and a nuisance, is in question, still would be an equally strong argument for keeping to the literal and narrower interpretation. If the Legislature had had in mind the possible destruction of healthy horses, there was no reason in the world why it should not have provided for paying the owners. The twelfth section does provide for paying them in all cases where they are not in fault, unless this is an exception. When, as here, the horse not only is not to be paid for, but may be condemned, without appeal, and killed, without giving the owner a hearing, or even notice, the grounds are very strong for believing that the statute means no more than it says, and is intended to authorize the killing of actually infected horses only. If the commissioners had felt any doubt, they could have had the horse appraised under section 12. Whether an action would have lain in that case, we need not decide.

The reasons for this construction seem decisive to a majority of the court when they consider the grave questions which would arise as to the constitutionality of the clause, if it were construed the other way.

The thirteenth section of the act of 1887, by implication, declares horses with the glanders to be nuisances, and we assume in favor of the defendant that it may do so constitutionally, and may authorize them to be killed without compensation to the owners. But the statute does not declare all horses to be nuisances, and the question is whether, if the owner of the horse denies that his horse falls within the class declared to be so, the Legislature can make the ex parte decision of a board like this conclusive upon him. That question is answered by the decision in Fisher v. McGirr, 1 Gray, 1, 61 Am. Dec. 381. It

is decided there that the owner has a right to be heard, and, further, that only a trial by jury satisfies the provision of article 12 of the Declaration of Rights, that no subject shall be deprived of his property but by the judgment of his peers, or the law of the land.

In Belcher v. Farrar, 8 Allen, 325, 328, it was said that "it would violate one of the fundamental principles of justice to deprive a party absolutely of the free use and enjoyment of his estate under an allegation that the purpose to which it was appropriated, or the mode of its occupation, was injurious to the health and comfort of others, and created a nuisance, without giving the owner an opportunity to appear and disprove the allegation, and protect his property from the restraint to which it was proposed to subject it." See, also, Sawyer v. Board, 125 Mass. 182; Winthrop v. Farrar, 11 Allen, 398.

Of course there cannot be a trial by jury before killing an animal supposed to have a contagious disease, and we assume that the Legislature may authorize its destruction in such emergencies without a hearing beforehand. But it does not follow that it can throw the loss on the owner without a hearing. If he cannot be heard beforehand he may be heard afterwards. The statute may provide for paying him in case it should appear that his property was not what the Legislature has declared to be a nuisance, and may give him his hearing in that way. If it does not do so, the statute may leave those who act under it to proceed at their peril, and the owner gets his hearing in an action against them.

An illustration, although not strictly an instance of the former mode, may be found in the statute authorizing firemen or engineers of fire departments to order houses to be pulled down in order to prevent the spreading of a fire, and making the town answerable to the house owner except in certain cases in which the house is practically worthless because it would have burned if it had not been destroyed. Pub. St. c. 35, §§ 3–5. No doubt the order would be conclusive in its legislative capacity or "so far as the res is concerned," as is said in Salem v. Railroad Co., 98 Mass. 431, 449, 96 Am. Dec. 650; that is to say, that the house should be pulled down. But the owner is preserved his right to a hearing in a subsequent proceeding for compensation. On the other hand, a case where a party proceeds at his peril is when he pulls down a house for the same object without the authority of statute. It is said that if the destruction is necessary, he is not liable. But by the common law as understood in this commonwealth, "if there be no necessity, then the individual who did the act shall be responsible." Shaw, C. J., in Taylor v. Plymouth, 8 Metc. 462, 465; Philadelphia v. Scott, 81 Pa. 80, 87, 22 Am. Rep. 738. See Mitchell v. Harmony, 13 How. 115, 134, 135, 14 L. Ed. 75. This means that the determination of the individual is subject to revision by a jury in an action, and is not conclusive on the owner of the house.

So in Blair v. Forehand, 100 Mass. 136, 97 Am. Dec. 82, 1 Am. Rep. 94, where it was held that a statute constitutionally might authorize the killing of unlicensed dogs as nuisances, it was assumed that the question whether the particular dog killed was unlicensed was open in an action against the officer who killed it, and that if he killed a licensed dog he would be liable in tort; in other words, that he proceeded in that respect at his own risk. Page 143, of 100 Mass. (97 Am. Dec. 82, 1 Am. Rep. 94), citing Shaw, C. J., in Tower v. Tower, 18 Pick. 262. It could have made no difference in that case if a board of three had been required to decide ex parte beforehand whether the dog was licensed.

In Salem v. Railroad Co., 98 Mass. 431, 96 Am. Dec. 650, it was decided, in agreement with the views which we have expressed, that the decision of a board of health that a nuisance existed on certain premises, and the order of the board that it be removed at the expense of the owner, were not conclusive upon the owner in a subsequent action against him to recover the expense, he having had no notice or opportunity to be heard. The general rule is that a judgment in rem, even when rendered by a regularly constituted court, after the fullest and most formal trial, is not conclusive of the facts on which it proceeds against persons not entitled to be heard and not heard in fact, although it does change or establish the status it deals with as against all the world from the necessities of the case, and frequently by express legislation. Brigham v. Fayerweather, 140 Mass. 411, 413, 5 N. E. 265.

It is true that it is said in Salem v. Railroad Co. that the board's determination of questions of discretion and judgment in the discharge of their duties would protect all those employed to carry such determinations into effect. The remark is obiter, and it is doubtful perhaps on reading the whole case whether it means that the determination would protect them in an action for damages when the statute provided no compensation for property taken which is not a nuisance. To give it such an effect as a judgment merely, would be inconsistent with the point decided, and with Brigham v. Fayerweather. We are not prepared to admit that a condemnation by the present board under section 13 could be made conclusive of the fact that the plaintiff's horse had the glanders, in the present action. See, further, Holcomb v. Moore, 4 Allen, 529; Foley v. Haverhill, 144 Mass. 352, 354, 11 N. E. 554.

But we are led by the dictum in Salem v. Railroad Co. to consider another possible suggestion. It may be said, suppose that the decision of the board is not conclusive that the plaintiff's horse had the glanders, still the Legislature may consider that self-protection requires the immediate killing of all horses which a competent board deem infected, whether they are so or not, and, if so, the innocent horses that are killed are a sacrifice to necessary self-protection, and need not be paid for.

In Train v. Disinfecting Co., 144 Mass. 523, 11 N. E. 929, 59 Am. Rep. 113, it was held that all imported rags might be required to be put through a disinfecting process at the expense of the owner. Of course, the order did not mean that the Legislature or board of health declared all imported rags to be infected, but simply that the danger was too great to risk an attempt at discrimination. If the Legislature could throw the burden on owners of innocent rags in that case, why could it not throw the burden on the owners of innocent horses in this? If it could order all rags to be disinfected, why might it not have ordered such rags to be disinfected as a board of three should determine summarily, and without notice or appeal? The latter provision would have been more favorable to owners, as they would have had a chance at least of escaping the burden, and it would stand on the same ground as the severer law.

The answer, or a part of it, is this: Whether the motives of the Legislature are the same or not in the two cases supposed, it declares different things to be dangerous and nuisances unless disinfected. In the one, it declares all imported rags to be so; in the other, only all infected rags. Within limits, it may thus enlarge or diminish the number of things to be deemed nuisances by the law, and courts cannot inquire why it includes certain property, and whether the motive was to avoid an investigation. But wherever it draws the line, an owner has a right to a hearing on the question whether his property falls within it, and this right is not destroyed by the fact that the line might have been drawn so differently as unquestionably to include that property. Thus, in the first case, the owner has a right to try the question whether his rags were imported; in the second, whether they were infected. His right is no more met in the second case by the fact that the Legislature might have made the inquiry immaterial by requiring all imported rags to be disinfected, than it would be in the first by the suggestion that possibly the Legislature might require all rags to be put through the same process whether imported or not. But if the property is admitted to fall within the line, there is nothing to try, if the line drawn is a valid one under the police power. All that Train v. Disinfecting Co. decided was that the line there considered was a valid one.

Still it may be said, if self-protection required the act, why should not the owner bear the loss? It may be answered that self-protection does not require all that is believed to be necessary to that end, nor even all that is reasonably believed to be necessary to that end. It only requires what is actually necessary. It would seem doubtful at least whether actual necessity ought not to be the limitation when the question arises under the constitution between the public and an individual. Such seems to be the law as between private parties in this commonwealth in the case of fires, as we have seen. It could not be assumed as a general principle without discussion that even necessity would exonerate a party from civil liability for a loss inflicted

knowingly upon an innocent person who neither by his person nor his property threatens any harm to the defendant. It has been thought by great lawyers that a man cannot shift his misfortunes upon his neighbor's shoulders in that way when it is a question of damages, although his act may be one for which he would not be punished. Gilbert v. Stone, Aleyn, 35, Style, 72; Scott v. Shepherd, 2 W. Bl. 892, 896. Upon this we express no opinion. It is enough to say that in this case actual necessity only required the destruction of infected horses, and that was all that the Legislature purported to authorize.

Again, there is a pretty important difference of degree, at least (Rideout v. Knox, 148 Mass. 368, 372, 19 N. E. 390, 2 L. R. A. 81, 12 Am. St. Rep. 560), between regulating the precautions to be taken in keeping property, especially property sought to be brought into the state, and ordering its destruction. We cannot admit that the Legislature has an unlimited right to destroy property without compensation, on the ground that destruction is not an appropriation to public use within article 10 of the declaration of rights. When a healthy horse is killed by a public officer, acting under a general statute, for fear that it should spread disease, the horse certainly would seem to be taken for public use as truly as if it were seized to drag an artillery wagon. The public equally appropriates it, whatever they do with it afterwards. Certainly the Legislature could not declare all cattle to be nuisances, and order them to be killed without compensation. Watertown v. Mayo, 109 Mass. 315, 319, 12 Am. Rep. 694; In re Jacobs, 98 N. Y. 98, 109. It does not attempt to do so. As we have said, it only declares certain diseased animals to be nuisances. And even if we assume that it could authorize some trifling amount of innocent property to be destroyed as a necessary means to the abatement of a nuisance, still, if in this section 13 it had added in terms that such healthy animals as should be killed by mistake for diseased ones should not be paid for, we should deem it a serious question whether such a provision could be upheld. See, further, Hutton v. Camden, 39 N. J. Law, 122, 23 Am. Rep. 203; Hale v. Lawrence, 21 N. J. Law, 714, 47 Am. Dec. 190; Grant v. U. S., 1 Ct. Cl. 41; Wiggins v. U. S., 3 Ct. Cl. 412; Mitchell v. Harmony, 13 How. 115, 134, 14 L. Ed. 75.

For these reasons, the literal, and, as we think, the true, construction of section 13 seems to us the only safe one to adopt, and accordingly we are of opinion that the authority and jurisdiction of the commissioners to condemn the plaintiff's horse under section 13 was conditional upon its actually having the glanders. If this be so, their order would not protect the defendants in a case where the commissioners acted outside their jurisdiction. Fisher v. McGirr, 1 Gray, 1, 45, 61 Am. Dec. 381. The fact as to the horse having the disease was open to investigation in the present action, and, on

the finding that it did not have it, the plaintiff was entitled to a ruling that the defendants had failed to make out their justification.

In view of our conclusion upon the main question, we have not considered whether an order signed by two members of the board, upon an examination by one, satisfies the statute, or whether cases like Ruggles v. Nantucket, 11 Cush. 433, and Parsons v. Pettingill, 11 Allen, 507, apply.

Exceptions sustained.

DEVENS, J. (dissenting).[6] I am unable to concur in the opinion of the majority of the court in the narrow and limited construction which they give to section 13 of chapter 252 of Acts of 1887, or in the view expressed of its constitutionality if otherwise construed. * * *

From the nature of the case, where, as under Gen. St. c. 26, the res is an alleged "nuisance, source of filth, cause of sickness," as an embankment by which running waters are stopped and filth accumulated, or like infected clothes from persons diseased, or rotting and putrescent meats on shipboard or in warehouses, or animals afflicted with contagious diseases, and many other noxious objects, action by boards of health must be prompt and summary. Powers to determine whether these objects should be removed or destroyed are undoubtedly very high powers, but they must, of necessity, be confided to boards of administration in order that the public safety may be guarded. Although of a quasi judicial nature, they must be exercised often without the delays which necessarily attend formal notices and formal trials; and where adjudications are fairly and honestly made, even if mistakes may sometimes occur, they should be held conclusive, so far as the res with which they deal is concerned. Certainly no one would voluntarily undertake the heavy responsibilities of a board of health, or, as in the case at bar, of cattle commissioners, if they were to be made responsible in damages for errors of judgment which they might commit. * * *

Applying these principles to the case at bar, they are decisive. The Legislature has decided that a horse infected with glanders is so dangerous to the public health, whether of other valuable domestic animals or of man, that it should be destroyed on account of its dangerous character, and should cease to be entitled to the usual protection of property. It is not an objection to this law that it has failed to provide compensation to the owner, as the animal is itself in its view a nuisance of serious danger to the community. It has empowered a respectable tribunal with powers similar to those of a board of health to determine whether an animal is of the class described in the statute. The exigency of the case does not permit, at least in the opinion of the Legislature, of notice, appeal, or other modes of reviewing the decision of such a tribunal. This appears to me a law-

[6] Only a portion of the opinion of Devens, J., is printed.

ful exercise of the police power, and the decision should be held conclusive in order that the community may be protected, and that those intrusted with the execution of the law may safely assume the responsibilities imposed upon them. The court, therefore, in my opinion, correctly refused to rule that the act of 1887, c. 252, by which Pub. St. c. 90, was repealed, was unconstitutional. * * *

I am authorized to say that Mr. Justice C. ALLEN and Mr. Justice KNOWLTON concur in this opinion.[7]

SECTION 69.—SAME—QUESTIONS OF FACT

ALLBUTT v. GENERAL COUNCIL OF MEDICAL EDUCATION AND REGISTRATION et al.

(Court of Appeal, 1889. 23 Q. B. Div. 400.)

Appeal by the plaintiff against the judgment of Pollock, B., at the trial of the action.

The plaintiff, Henry Arthur Allbutt, was a medical practitioner, who had been registered as such under the provisions of the Medical Act, 1858 (21 & 22 Vict. c. 90). The defendants were the General Council of Medical Education and Registration of the United Kingdom (constituted under that act) and W. J. C. Miller, their registrar.[8]

LOPES, L. J., delivered the judgment of the court (Lord COLERIDGE, C. J., and LINDLEY and LOPES, L. JJ., sitting) as follows:

[7] By chapter 195, § 3, of the Laws of Massachusetts of 1892, the following words were added to Laws 1887, c. 252, § 3: "And may also pay a reasonable compensation for the animal destroyed, should a post mortem examination prove that said animal was free from the disease for which it was condemned." See, now, Rev. Laws 1902, c. 90, § 6.

In Com. v. Sisson, 189 Mass. 247, 75 N. E. 619, 1 L. R. A. (N. S.) 752, 109 Am. St. Rep. 630 (1905), the court said: "The difference between the majority and the minority of the court in Miller v. Horton was on the construction of the act there in question."

"Boards of health, under the acts referred to (Laws N. Y. 1885, c. 270), cannot as to any existing state of facts, by their determination make that a nuisance which is not in fact a nuisance. They have no jurisdiction to make any order or ordinance abating an alleged nuisance, unless there be in fact a nuisance. It is the actual existence of a nuisance which gives them jurisdiction to act." People ex rel. Copcutt v. Board of Health of Yonkers, 140 N. Y. 1, 35 N. E. 320, 23 L. R. A. 481, 37 Am. St. Rep. 552 (1893), ante, p. 139.

See, also, Underwood v. Green, 42 N. Y. 140 (1870); Lowe v. Conroy, 120 Wis. 151, 97 N. W. 942, 66 L. R. A. 907, 102 Am. St. Rep. 983 (1904), ante, p. 306; In re Smith, 146 N. Y. 68, 40 N. E. 497, 28 L. R. A. 820, 48 Am. St. Rep. 769 (1895).

[8] Only a portion of this case is printed.

The plaintiff complains that the defendants (the General Council of Medical Education and Registration of the United Kingdom) have wrongfully and unlawfully erased his name from the medical register, and asks for a mandamus commanding the defendants to restore his name to the register. The plaintiff also complains that the defendants have libeled him, by printing and publishing of him in a book, entitled Minutes of the General Council, that his name had been erased from the Medical Registry, page 317, and that in the opinion of the council the plaintiff had committed the offense charged against him—that is to say, of having published and publicly caused to be sold a work entitled "The Wife's Handbook," in London and elsewhere, and at so low a price as to bring the work within the reach of both sexes, to the detriment of public morals, and that the offense was, in the opinion of the council, infamous conduct in a professional respect. With regard to the erasure of the plaintiff's name, the plaintiff says that the defendants acted without jurisdiction, that there was no evidence of any infamous conduct in a professional respect, and, therefore, nothing upon which to found their jurisdiction. The defendants say, on the other hand, that they lawfully, and in the exercise of a jurisdiction conferred upon them by the act of Parliament, struck the plaintiff's name off the register, and that, as there was jurisdiction to enter upon this inquiry, they (the Medical Council) are the sole judges of what was done during the inquiry which they had jurisdiction to initiate. The learned judge thought that there was no evidence of any of the complaints which he ought to leave to the jury, and gave judgment for the defendants.

The section upon which the council have acted in erasing the plaintiff's name is the twenty-ninth section of 21 & 22 Vict. c. 90, which says: "If any registered medical practitioner shall be convicted in England or Ireland of any felony or misdemeanor, or in Scotland of any crime or offense, or shall after due inquiry be judged by the general council to have been guilty of infamous conduct in any professional respect, the general council may, if they see fit, direct the registrar to erase the name of such medical practitioner from the register." Having regard to the nature of the complaint, the council clearly had jurisdiction to enter upon the inquiry, and, having that jurisdiction, are constituted by the legislature the sole judges whether that complaint was substantiated. To use the words of Cockburn, C. J., in Ex parte La Mert, 33 L. J. (Q. B.) 70: "This court has no more power to review their decision than they would have, in the present mode of proceeding, of determining whether the facts had justified a conviction for felony or misdemeanor under the first branch of the section."

It is said by the plaintiff that there was no "due inquiry," and that that question onght to have been left to the jury. We think that there was no evidence of any absence of a due inquiry which ought to have been left to the jury. All charges of mala fides were with-

drawn, and it was admitted that the council acted honestly, and without any improper feeling or motive towards the plaintiff. We can find nothing irregular in the proceedings of the council; the plaintiff had every opportunity afforded to him of bringing his case before the council, who heard his counsel and his evidence, and adjudicated thereon. * * * [9]

FIRE DEPARTMENT OF CITY OF NEW YORK v. GILMOUR.

(Court of Appeals of New York, 1896. 149 N. Y. 453, 44 N. E. 177, 52 Am. St. Rep. 748.)

Appeal from Common Pleas of New York City and County, General Term.

Action by the Fire Department of the City of New York against John Gilmour to recover penalty imposed for refusal to obey an order of the board of fire commissioners. There was judgment for plaintiff, which was reversed by the General Term (4 Misc. Rep. 202, 23 N. Y. Supp. 1022), and from the order of reversal plaintiff appeals. Affirmed.

This action was brought in a district court in the city of New York, to recover of the defendant a penalty of $25 for neglect on his part to obey an order dated May 21, 1892, purporting to have been made under the authority of the board of commissioners of the fire department of the city of New York, requiring him, within five days from the service of the order, to build a wall of stone, brick, or other fireproof material, not more than 18 feet in height, around the yard of premises 87 White street, in the city of New York, in rear of the building thereon, and prohibiting him from storing in the yard boxes of wood to a height above a point 12 inches below the top of the wall. The defendant occupied the building and yard 87 White street, using the yard (a space about 60 by 35 feet) for the storing of packing boxes manufactured by him at another place, and had so used the yard for a period of about 14 years. The boxes were piled at times as high as 20 to 30 feet.

The order contains a recital that the packing boxes so stored were combustible, and were kept and stored in such quantity as to be dangerous, "and the same is considered dangerous in causing and promoting fires, and prejudicial to the safety of life and property, and in its present condition a violation of law." The order refers to chapter 410 of the Laws of 1882 (Consolidation Act) as the basis of the order. By section 463 of that act, the board of fire commissioners, and its officers and agents under their direction, or the direction of either of the commissioners, are empowered to "enter any

[9] See, also, Bogle v. Sherborne Local Board, 46 Justice of Peace, 675 (1880); Attorney General v. Great Western Ry. Co., 4 Ch. D. 735 (1876).

building or premises where any merchandise, gunpowder, firewood, boards, shingles, shavings," etc., "or other combustible materials may be lodged, and upon finding that any of them are defective or dangerous, or that a violation of this title exists therein, may deliver a written or printed notice containing an extract from this title of the provisions in reference thereto, and notice of any violation thereof, and notice to remove, amend or secure the same within a period to be fixed therein." The section proceeds to declare that, in case of neglect or refusal on the part of the occupant or of the possessor of such combustible materials "so to remove or amend or secure the same within the time and in the manner directed by the said commissioners in such notice, the party offending shall forfeit and pay, in addition to any penalty otherwise imposed, the sum of twenty-five dollars, and the further sum of five dollars for each day's neglect," etc. Attached to the notice and order served on the defendant was a copy of section 463, and also of section 467 of the act.

The surveyor of combustibles was the only witness sworn on the trial. He testified that he made an inspection of 87 White street, and was directed, before going there, to report against the place "if they did not have a proper wall around it, and a large number of boxes were stored there." He made the report, and the order was thereupon issued. The defendant sought to show by the witness facts bearing upon the condition of the premises, their surroundings, and the absence of danger or conflagration from the boxes piled in the yard. Most of the questions put to the witness bearing upon the question of the propriety or reasonableness of the order were excluded by the justice, on the ground that the court could not consider the matter. The defendant, on the conclusion of the plaintiff's case, offered to prove by two witnesses a variety of facts which were enumerated, bearing upon the question of the reasonableness of the order, and to show that the use made by him of the premises did not involve any danger of fire beyond the ordinary danger attending the ordinary uses of property. The justice refused to hear the evidence, saying "the question before the court is, has there been a refusal to comply with the order of the board? The court regrets that it cannot go into the question whether the order was necessary, or whether the department acted properly." The court rendered judgment for the plaintiff for the penalty given by statute, which was reversed on appeal to the General Term of the New York Common Pleas, and from the order of reversal the plaintiff brings this appeal.

ANDREWS, C. J. (after stating the facts).[10] The action was tried and determined by the justice of the district court upon the theory that the determination of the board of fire commissioners that the use made by the defendant of the yard of his premises for the piling

[10] Only a portion of the opinion of Andrews, C. J., is printed.

of boxes was dangerous, as being likely to cause or promote a conflagration, to the prejudice of life and property, was conclusive, and not open to inquiry in an action brought for the penalty, given by section 463 of the consolidation act. It was upon this view of the law that the justice excluded the evidence offered by the defendant to show that, in fact, the use made by him of the yard did not involve any unusual risk of fire, either from the inherent nature of the property stored therein, or in promoting a conflagration originating on adjacent premises. This, the justice declared, he could not consider, but was confined to the simple inquiry whether the order of the board of commissioners had been disobeyed.

We think the justice erred in the principle upon which he proceeded. There can be no doubt of the power of the Legislature to enact regulations for the protection of cities or villages against the serious dangers from conflagrations. It is one of the subjects to which the police power of the state extends, and there is no one in the wide range of this power upon which the Legislature has more frequently acted. It may directly enact a code of regulations applicable to exposed localities, or, as is more commonly done, it may invest municipalities with the power to pass ordinances regulating the subject. The authority given in most charters of municipalities to the legislative body to fix fire limits, to prohibit the erection of buildings therein of wood or other combustible materials, the storing of gunpowder or other explosive compounds in quantities and under circumstances hazardous to life and property, are among the familiar instances of the delegated power. Regulations on this subject are restrictions of personal freedom and the free use of property. But they are justified by public necessity, and so are within the acknowledged power of the Legislature.

The Legislature, by section 463 of the consolidation act, conferred upon a subordinate department of the city government the power to determine in specific cases whether the use of property for storage of combustible materials by the owner or occupant was a menace to the public safety, and, upon the determination of the board of commissioners that such use was dangerous, authorized an order to be made by the board for the discontinuance of such use or the regulation thereof, upon disobedience to which the owner or occupant is subjected to a penalty. It is manifest that if an irreviewable discretion is thereby lodged in the board, and the citizen is precluded in a suit for the penalty from contesting the reasonableness of an order made, the board is vested with a power of the most arbitrary description, liable to great abuse—a power which, though in terms vested in the board of commissioners, is, sometimes at least, as the evidence in this case shows, in fact wielded by the subordinate appointees in the name of the department. It would have been competent for the Legislature to have enacted a general regulation prohibiting the piling of boxes or masses of combustible material in

yards or open spaces in the populous and defined districts within a city, and such an enactment every citizen would be bound to obey; and, where sued for a penalty, it would be no defense to a party who had violated the law to show that in his particular case, owing to exceptional circumstances, the regulation was unnecessary or unreasonable.

The will of the Legislature would stand as the reason for the rule, and, being general, no one, however situated, could escape its obligation, unless, indeed, he could establish that, passing beyond the police power, it involved some right of person or property protected by the Constitution. In other words, where the Legislature, in the exercise of the police power, enacts a regulation defining the duty of citizens, either in respect to their personal conduct or the use of their property, the reasonableness of the thing enjoined or prohibited is not an open question, because the supreme legislative power has determined it by enacting the rule. See Dill. Mun. Corp. § 328, and cases cited. But where the Legislature, as in the present case, enacts no general rule of conduct, but invests a subordinate board with the power to investigate and determine the fact whether, in any special case, any use is made of property for purposes of storage, dangerous on account of its liability to originate or extend a conflagration, not prescribing the uses which it permits or disallows, then we are of opinion that in such cases the reasonableness of the determination of the board, or of the order prohibiting a particular use in accordance with such determination, is open to contestation by the party affected thereby, and that he is entitled when sued for a disobedience of the order, to show that it was unreasonable, unnecessary, and oppressive. * * * It was not necessary in this case that the defendant should have been notified (as he was not) of the investigation made of his premises by the appointees of the fire commissioners, or that he should have been afforded an opportunity to be heard before the order was made. Health Department of City of New York v. Rector, etc., of Trinity Church, 145 N. Y. 32, 39 N. E. 833, 27 L. R. A. 710, 45 Am. St. Rep. 579. But we think he was entitled to contest, in the action for the penalty, the reasonableness of the order made and the facts upon which it proceeded. People v. Board of Health of City of Yonkers, 140 N. Y. 1, 35 N. E. 320, 23 L. R. A. 481, 37 Am. St. Rep. 522; Health Department of City of New York v. Rector, etc., of Trinity Church, supra; City of Salem v. Eastern R. Co., 98 Mass. 431, 96 Am. Dec. 650.

For the denial of this right, we think the judgment should be affirmed. All concur.

Judgment affirmed.[11]

[11] See, also, Chatfield v. New Haven (C. C.) 110 Fed. 788 (1901).

"Whether or not the Secretary of the Treasury failed to carry into effect the expressed purpose of Congress, and established standards which operated to exclude teas which would have been entitled to admission had

SECTION 70.—MILITARY POWER

MARTIN v. MOTT.

(Supreme Court of United States, 1827. 12 Wheat. 19, 6 L. Ed. 537.)

Error to the Court for the Trial of Impeachments and Correction of Errors of the State of New York.

Mr. Justice STORY delivered the opinion of the court.[12]

This is a writ of error to the judgment of the Court for the Trial of Impeachments and the Correction of Errors of the State of New York, being the highest court of that state, and is brought here in virtue of the twenty-fifth section of the judiciary act of 1789, c. 20. The original action was a replevin for certain goods and chattels, to which the original defendant put in an avowry, and to that avowry there was a demurrer, assigning nineteen distinct and special causes of demurrer. Upon a joinder in demurrer, the Supreme Court of the state gave judgment against the avowant; and that judgment was affirmed by the high court to which the present writ of error is addressed.

The avowry, in substance, asserts a justification of the taking of the goods and chattels to satisfy a fine and forfeiture imposed upon the original plaintiff by a court-martial, for a failure to enter the service of the United States as a militiaman, when thereto required

proper standards been adopted, is a question we are not called upon to consider. The sufficiency of the standards adopted by the Secretary of the Treasury was committed to his judgment, to be honestly exercised, and if that were important there is no assertion here of bad faith or malice on the part of that officer in fixing the standards, or on the part of the defendant in the performance of the duties resting on him." Buttfield v. Stranahan, 192 U. S. 470, 496, 497, 24 Sup. Ct. 349, 355, 48 L. Ed. 525 (1904).

Other cases in this collection illustrating the appeal to the courts against administrative action in the matter of public health and safety or order: Lowe v. Conroy, 120 Wis. 151, 97 N. W. 942, 66 L. R. A. 907, 102 Am. St. Rep. 983 (1904); Raymond v. Fish, 51 Conn. 80, 50 Am. Rep. 3 (1883); Craig v. Charleston, 180 Ill. 154, 54 N. E. 184 (1899); Chicago v. Chic. City R. Co., 222 Ill. 560, 78 N. E. 890 (1906); Dobbins v. Los Angeles, 195 U. S. 223, 25 Sup. Ct. 18, 49 L. Ed. 169 (1904); Meeker v. Van Rensselaer, 15 Wend. (N. Y.) 397 (1836); Waye v. Thompson, L. R. 15 Q. B. D. 342 (1885); Hutton v. Camden, 39 N. J. Law, 122, 23 Am. Rep. 203 (1876); Metropolitan Board of Health v. Heister, 37 N. Y. 661 (1868); People v. Board of Health of Yonkers, 140 N. Y. 1, 35 N. E. 320, 23 L. R. A. 481, 37 Am. St. Rep. 522 (1893); Hartman v. Wilmington, 1 Marvel (Del.) 215, 41 Atl. 74 (1894); Health Dept. v. Trinity Church, 145 N. Y. 32, 39 N. E. 833, 27 L. R. A. 710, 45 Am. St. Rep. 579 (1895); Salem v. Eastern R. Co.,

[12] Only a portion of the opinion of Story, J., is printed.

by the President of the United States, in pursuance of the act of the 28th of February, 1795, c. 101. It is argued that this avowry is defective, both in substance and form; and it will be our business to discuss the most material of these objections; and as to others, of which no particular notice is taken, it is to be understood that the court are of opinion that they are either unfounded in fact or in law, and do not require any separate examination.

For the more clear and exact consideration of the subject, it may be necessary to refer to the Constitution of the United States, and some of the provisions of the act of 1795. The Constitution declares that Congress shall have power "to provide for calling forth the militia, to execute the laws of the Union, suppress insurrections, and repel invasions," and also "to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States." In pursuance of this authority, the act of 1795 has provided "that whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe, it shall be lawful for the President of the United States to call forth such number of the militia of the state or states most convenient to the place of danger, or scene of action, as he may judge necessary to repel such invasion, and to issue his order for that purpose to such officer or officers of the militia as he shall think proper." And like provisions are made for the other cases stated in the Constitution. It has not been denied here that the act of 1795 is within the constitutional authority of Congress, or that Congress may not lawfully provide for cases of imminent danger of invasion, as well as for cases where an inva-

98 Mass. 431, 96 Am. Dec. 650 (1868); Reynolds v. Schultz, 27 N. Y. Super. 282 (1867); King v. Davenport, 98 Ill. 305, 38 Am. Rep. 89 (1881); North American Cold Storage Co. v. Chicago, 211 U. S. 306, 29 Sup. Ct. 101, 53 L. Ed. 195 (1908); Wilcox v. Heming, 58 Wis. 144, 15 N. W. 435, 46 Am. Rep. 625 (1883); Queen v. Wood, 5 El. & Bl. 49 (1855).

Other cases illustrating the appeal to the courts against administrative action in the matter of refusal or revocation of licenses: Bassett v. Godschall, 3 Wilson, 121 (1770); Downer v. Lent, 6 Cal. 94, 65 Am. Dec. 489 (1856); Dolan's Appeal, 108 Pa. 564 (1885); Thompson v. Koch, 98 Ky. 400, 33 S. W. 96 (1895); Hopson's Appeal, 65 Conn. 140, 31 Atl. 531 (1894); State v. District Court, 19 Mont. 501, 48 Pac. 1104 (1897); Gage v. Censors, 63 N. H. 92, 56 Am. Rep. 492 (1884); Com. v. Kinsley, 133 Mass. 578 (1882); Martin v. State, 23 Neb. 371, 36 N. W. 554 (1888); King v. Venables, 2 Ld. Raym. 1405 (1725); People v. McCoy, 125 Ill. 289, 17 N. E. 786 (1888); People v. Department of Health, 189 N. Y. 187, 82 N. E. 187, 13 L. R. A. (N. S.) 894 (1907); State v. Lamos, 26 Me. 258 (1846); U. S. v. Douglass, 19 D. C. 99 (1890); Dodd v. Francisco, 68 N. J. Law, 490, 53 Atl. 219 (1902); People v. Board of Commissioners, 59 N. Y. 92 (1874); Lillienfeld v. Commonwealth, 92 Va. 818, 23 S. E. 882 (1896); Baldwin v. Smith, 82 Ill. 162 (1876); State v. Justices, 15 Ga. 408 (1854); People v. State Board Dental Examiners, 110 Ill. 180 (1884); Ill. State Board Dental Exam. v. People, 123 Ill. 227, 13 N. E. 201 (1887); State v. Chittenden, 112 Wis. 569, 88 N. W. 587 (1902); In re Sparrow, 138 Pa. 116, 20 Atl. 711 (1890); Gross' License, 161 Pa. 349, 29 Atl. 25 (1894); Harrison v. People, 222 Ill. 150, 78 N. E. 52 (1906); Devin v. Belt, 70 Md. 352, 17 Atl. 375 (1889).

sion has actually taken place. In our opinion there is no ground for a doubt on this point, even if it had been relied on, for the power to provide for repelling invasions includes the power to provide against the attempt and danger of invasion, as the necessary and proper means to effectuate the object. One of the best means to repel invasion is to provide the requisite force for action before the invader himself has reached the soil.

The power thus confided by Congress to the President is, doubtless, of a very high and delicate nature. A free people are naturally jealous of the exercise of military power; and the power to call the militia into actual service is certainly felt to be one of no ordinary magnitude. But it is not a power which can be executed without a correspondent responsibility. It is, in its terms, a limited power, confined to cases of actual invasion, or of imminent danger of invasion. If it be a limited power, the question arises, by whom is the exigency to be judged of and decided? Is the President the sole and exclusive judge whether the exigency has arisen, or is it to be considered as an open question, upon which every officer to whom the orders of the President are addressed may decide for himself, and equally open to be contested by every militiaman who shall refuse to obey the orders of the President? We are all of opinion that the authority to decide whether the exigency has arisen belongs exclusively to the President, and that his decision is conclusive upon all other persons. We think that this construction necessarily results from the nature of the power itself, and from the manifest object contemplated by the act of Congress. The power itself is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union. A prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object. The service is a military service, and the command of a military nature; and in such cases every delay, and every obstacle to an efficient and immediate compliance, necessarily tend to jeopard the public interests. While subordinate officers or soldiers are pausing to consider whether they ought to obey, or are scrupulously weighing the evidence of the facts upon which the commander in chief exercises the right to demand their services, the hostile enterprise may be accomplished without the means of resistance. If "the power of regulating the militia, and of commanding its services in times of insurrection and invasion, are (as it has been emphatically said they are) natural incidents to the duties of superintending the common defense, and of watching over the internal peace of the confederacy," these powers must be so construed as to the modes of their exercise as not to defeat the great end in view. If a superior officer has a right to contest the orders of the President upon his own doubts as to the exigency having arisen, it must be equally the right of every inferior officer and

soldier; and any act done by any person in furtherance of such orders would subject him to responsibility in a civil suit, in which his defense must finally rest upon his ability to establish the facts by competent proofs. Such a course would be subversive of all discipline, and expose the best-disposed officers to the chances of ruinous litigation. Besides, in many instances, the evidence upon which the President might decide that there is imminent danger of invasion might be of a nature not constituting strict technical proof, or the disclosure of the evidence might reveal important secrets of state, which the public interest, and even safety, might imperiously demand to be kept in concealment.

If we look at the language of the act of 1795, every conclusion drawn from the nature of the power itself is strongly fortified. The words are, "whenever the United States shall be invaded, or be in imminent danger of invasion, etc., it shall be lawful for the President, etc., to call forth such number of the militia, etc., as he may judge necessary to repel such invasion." The power itself is confided to the Executive of the Union, to him who is, by the Constitution, "the commander in chief of the militia, when called into the actual service of the United States," whose duty it is to "take care that the laws be faithfully executed," and whose responsibility for an honest discharge of his official obligations is secured by the highest sanctions. He is necessarily constituted the judge of the existence of the exigency in the first instance, and is bound to act according to his belief of the facts. If he does so act, and decides to call forth the militia, his orders for this purpose are in strict conformity with the provisions of the law; and it would seem to follow as a necessary consequence that every act done by a subordinate officer, in obedience to such orders, is equally justifiable. The law contemplates that, under such circumstances, orders shall be given to carry the power into effect; and it cannot therefore be a correct inference that any other person has a just right to disobey them. The law does not provide for any appeal from the judgment of the President, or for any right in subordinate officers to review his decision, and in effect defeat it. Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts. And, in the present case, we are all of opinion that such is the true construction of the act of 1795. It is no answer that such a power may be abused, for there is no power which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the Constitution itself. In a free government the danger must be remote, since, in addition to the high qualities which the Executive must be presumed to possess, of public virtue, and honest devotion to the public interests, the

frequency of elections, and the watchfulness of the representatives of the nation, carry with them all the checks which can be useful to guard against usurpation or wanton tyranny. * * *[13]

[13] "The first and second objections to the pleas are wholly untenable. It is not necessary to allege that a case had occurred which gave authority to the President of the United States to call forth the militia, under the act of the 28th of February, 1795. That act, after enumerating the cases, on the occurrence of which the militia may be called into the public service of the United States, vests in the President a high discretionary power. He, and he alone, is made the judge, as well of the happening of the events on which the militia may be called forth, as of the number, time and destination of that species of force. In every case in which the President acts under that law, he acts upon his responsibility under the Constitution. If it was necessary to the validity of these pleas to state, either that the United States were invaded, or in imminent danger of invasion, or that the laws of the United States were opposed, or the execution thereof obstructed, the matter thus stated would be issuable, and the plaintiff might, in his replication, take issue on them, and oblige the defendant to prove the occurrence of a case specified in the act; and thus every subordinate officer, who should be called into service, would be put to the necessity, when he was sued for any act of discipline upon the privates, to prove to a jury that the President had acted correctly in making his requisitions, and if he failed in this proof it would subject him to damages for an act otherwise lawful. To countenance such a construction of the act would be monstrous. Every trial would either subject all the archives of state to an examination before the court and jury, or the defendant would inevitably be found guilty. No man would dare to obey the orders, either of the President, or of his superior officer, lest, peradventure, the President had either abused his authority, or misjudged in relation to the occurrence of the fact which authorized him to call forth the militia. It is a general and sound principle that whenever the law vests any person with a power to do an act, and constitutes him a judge of the evidence on which the act may be done, and, at the same time, contemplates that the act is to be carried into effect through the instrumentality of agents, the person thus clothed with power is invested with discretion, and is, quoad hoc, a judge. His mandates to his legal agents, on his declaring the event to have happened, will be a protection to those agents; and it is not their duty or business to investigate the facts thus referred to their superior, and to rejudge his determination. In a military point of view, the contrary doctrine would be subversive of all discipline; and, as it regards the safety and security of the United States and its citizens, the consequences would be deplorable and fatal. It was not necessary, therefore, to set forth the occurrence of these events in the pleas as a justification of the defendant's conduct, because they were not, and could not, be matter of trial." Vanderheyden v. Young, 11 Johns. (N. Y.) 150, 157 (1814).

Compare Wise v. Withers, 3 Cranch, 331, 2 L. Ed. 457 (1805)—distress for nonpayment of militia fine; action of trespass against the collector—Marshall, C. J.: "The court must * * * declare that a justice of the peace, within the District of Columbia, is exempt from the performance of militia duty. It follows, from this opinion, that a court-martial has no jurisdiction over a justice of the peace, as a militiaman; he could never be legally enrolled; and it is a principle that a decision of such a tribunal, in a case clearly without its jurisdiction, cannot protect the officer who executes it. The court and the officer are all trespassers." Also Little v. Barreme, 2 Cranch, 170, 2 L. Ed. 243 (1804), ante, p. 332.

In re BOYLE.

(Supreme Court of Idaho, 1899. 6 Idaho, 609, 57 Pac. 706, 45 L. R. A. 832, 96 Am. St. Rep. 286.)

Application of William Boyle for writ of habeas corpus. Denied.

HUSTON, C. J. This is an application for a writ of habeas corpus. To the petition a general demurrer is filed. The only question presented for our determination is, does the petition state facts entitling the petitioner to the writ? The petition alleges the illegal detention of the petitioner, and sets forth the alleged cause of, and authority for, such detention; and it is upon the alleged illegality or want of authority therefor that petitioner bases his right to the writ. As to the facts set up in the petition, so far as not contradictory or conflicting, for the purposes of this decision, in so far as they are assumed to be true, do they constitute sufficient ground for the issuance of the writ? It appears from the petition:

That on the 4th day of May, 1899, the Governor of the state of Idaho issued the following proclamation:

"State of Idaho, Executive Office.

"Whereas, it appearing to my satisfaction that the execution of process is frustrated and defied in Shoshone county, state of Idaho, by bodies of men and others, and that combinations of armed men to resist the execution of processes and to commit deeds of violence exist in said county of Shoshone; and whereas, the civil authorities of said county of Shoshone do not appear to be able to control such bodies of men, or prevent the destruction of property and other acts of violence; and whereas, on Saturday, the 29th day of April, 1899, at or near the town of Wardner Junction, in said county of Shoshone, state of Idaho, an armed mob did then and there wantonly destroy property of great value, with attendant loss of life; and whereas, said destruction of property, with attendant loss of life, by mob violence, as above set forth, is but one and a repetition of a series of similar outrages covering a period of six years or more just passed, the perpetrators of said outrages seeming to enjoy immunity from arrest and punishment through subserviency of peace officers of said county of Shoshone, or through fear on the part of said officers to such bodies of lawless and armed men; and whereas, I have reason to believe that similar outrages may occur at any time, and believing the civil authorities of said county of Shoshone are entirely unable to preserve order and protect property: Now, therefore, I, Frank Steunenberg, Governor of the state of Idaho, by virtue of authority in me vested, do hereby proclaim and declare the said county of Shoshone, in the state of Idaho, to be in a state of insurrection and rebellion. In testimony whereof, I have hereunto set my hand and caused to be affixed the great seal of the state. Done at the city of Boisé, the capital of the state of Idaho, this 4th day of May, A. D. 1899, and of the

independence of the United States of America, the one hundred and twenty-third. Frank Steunenberg.

"By the Governor: M. Patrie, Secretary of State."

That thereafter, upon the call of the Governor, a military force was sent into said Shoshone county by the President of the United States, which proceeded at once to secure the arrest of the parties engaged in and who committed the outrages of the 29th of April for the purpose of bringing such parties before the proper tribunal for trial.

Among the parties who were arrested as being implicated in the murders, and other crimes resulting from the insurrection, riot, or rebellion of the 29th of April, was the petitioner, and he bases his claim to be discharged from such arrest upon various grounds: "(1) No insurrection, riot, or rebellion now exists in Shoshone county. (2) The Governor has no authority to proclaim martial law, or suspend the writ of habeas corpus. (3) That martial law does not exist in Shoshone county, and has not been proclaimed in said Shoshone county by any one having authority to make such proclamation. (4) That the little disturbance of the 29th of April is over; that the parties implicated in it, after having destroyed about a quarter of a million dollars of property, and committed several murders, have retired to their homes; and that, in recognition of the inalienable rights of the citizen, they ought not to be disturbed. (5) That the Governor had no right or authority to send an agent or representative to Shoshone county to consult and advise with the military officer sent there by the federal government to assist in putting down the insurrection and restoring order in said county."

Counsel have argued ably and ingeniously upon the question as to whether the authority to suspend the writ of habeas corpus rests with the legislative or executive power of the government; but, from our view of this case, that question cuts no figure. We are of the opinion that whenever, for the purpose of putting down insurrection or rebellion, the exigencies of the case demanded for the successful accomplishment of this end in view, it is entirely competent for the executive or for the military officer in command, if there be such, either to suspend the writ or disregard it, if issued. The statutes of this state make it the duty of the Governor, whenever such a state or condition exists as the proclamation of the Governor shows does and has existed in Shoshone county for the past six or seven years, to proclaim such locality in a state of insurrection, and to call in the aid of the millitary of the state, or of the federal government, to suppress such insurrection, and re-establish permanently the ascendency of the law. It would be an absurdity to say that the action of the executive, under such circumstances, may be negatived, and set at naught by the judiciary, or that the action of the executive may be interfered with or impeded by the judiciary. If the courts are to be made a sanctuary, a city of refuge, whereunto malefactors may flee for protection from punishment justly due for the commission of crime, they will soon cease to

be that palladium of the rights of the citizen so ably described by counsel.

Section 7405 of the Revised Statutes provides: "When an armed force is called out for the purpose of suppressing an unlawful or riotous assembly, or arresting the offenders and is placed under the direction of any civil officer, it must obey the orders in relation thereto of such civil officer."

The facts set forth in the Governor's proclamation warranted his action. It is true that some of the facts recited therein are negatived by averment in the petition, which would seem to put in issue the truth or falsity of those recitals. On application for writ of habeas corpus, the truth of recitals of alleged facts in a proclamation issued by the Governor proclaiming a certain county to be in a state of insurrection and rebellion will not be inquired into or reviewed. The action of the Governor in declaring Shoshone county to be in a state of insurrection and rebellion, and his action in calling to his aid the military forces of the United States for the purpose of restoring good order and the supremacy of the law, has the effect to put into force, to a limited extent, martial law in said county. Such action is not in violation of the Constitution, but in harmony with it, being necessary for the preservation of government. In such case the government may, like an individual acting in self-defense, take those steps necessary to preserve its existence. If hundreds of men can arm themselves and destroy vast properties, and kill and injure citizens, thus defeating the ends of government, and the government be unable to take all needful and necessary steps to restore law and maintain order, the state will then be impotent, if not entirely destroyed, and anarchy placed in its stead.

It is no argument to say that the executive was not applied to by any county officer of Shoshone county to proclaim said county to be in a state of insurrection, and for this reason the proclamation was without authority. The recitals in the proclamation show the existence of one of two conditions, viz.: That the county officers of said county, whose duty it was to make said application, were either in league with the insurrectionists, or else, through fear of the latter, said officers refrained from doing their duty. Under the circumstances, it was the duty of the executive to act without any application from any county officer of Shoshone county. This conclusion is based upon what we deem a correct construction of the provisions of our Constitution and statutes in force, construed in pari materia. It having been demonstrated to the satisfaction of the Governor, after some six or seven years' experience, that the execution of the laws in Shoshone county, through the ordinary and established means and methods, was rendered practically impossible, it became his duty to adopt the means prescribed by the statute for establishing in said county the supremacy of the law, and insure the punishment of those by whose unlawful and criminal acts such a condition of things has been brought about; and

it is not the province of the courts to hinder, delay, or place obstructions in the path of duty prescribed by law for the executive, but rather to render to him all the aid and assistance in their power in his efforts to bring about the consummation most devoutly prayed for by every good and law-abiding citizen in the state.

The various questions raised by counsel have been considered by the court, and it is our conclusion that the petition does not state facts which show that the writ demanded ought to issue; wherefore the said demurrer has been sustained, and the writ denied.

QUARLES and SULLIVAN, JJ., concur.[14]

SECTION 71.—TAXATION AND REVENUE—JURISDICTIONAL PREREQUISITES

McLEAN v. JEPHSON.

(Court of Appeals of New York, 1890. 123 N. Y. 142, 25 N. E. 409, 9 L. R. A. 493.)

RUGER, C. J. This was an application to the Supreme Court by the receiver of taxes in the city of New York, under section 857 of the city charter (chapter 410, Laws 1882), for a warrant to enforce the payment of a tax upon personal property by a nonresident. The section authorizing the proceeding reads as follows: "In case of the refusal or neglect of any person to pay any tax imposed on him for personal property, if there be no goods or chattels in his possession upon which the same may be levied by distress and sale according to law, and if the property assessed shall exceed the sum of one thousand dollars, the said receiver, if he has reason to believe that the person taxed has debts, credits, choses in action, or other personal property, not taxed elsewhere in this state and upon which levy cannot be made according to law, may thereupon, in his discretion, make application within one year to the court of common pleas of the county, or the Supreme Court, to enforce the payment of such tax."

The application was based upon a petition alleging the imposition of the tax upon the defendant in the year 1883, as a nonresident doing business and having capital invested therein, in the city of New

[14] See, also, Com. ex rel. Wadsworth v. Shortall, 206 Pa. 165, 55 Atl. 952, 65 L. R. A. 193, 98 Am. St. Rep. 759 (1903).

Other cases illustrating the appeal to the courts against the exercise of military or executive power; Mostyn v. Fabrigas, Cowper, 161 (1774); Little v. Barreme, 2 Cranch, 170, 2 L. Ed. 243 (1804); Georgia v. Stanton, 6 Wall. 50, 18 L. Ed. 721 (1867); Mississippi v. Johnson, 4 Wall. 475, 18 L. Ed. 437 (1866).

York. An order to show cause why the relief asked should not be granted was issued and served upon the defendant, and, upon the return day thereof, he appeared and showed that he was at the time the alleged assessment was made, and for a long time previous thereto had been, a resident of the state of New Jersey, and had never transacted business in the city of New York, except as the agent of a corporation organized and doing business in the state of New Jersey as a manufacturer of carriages; that the company had a wareroom in the city of New York for the exhibition and sale of its own manufactures; and that defendant had charge of such wareroom as its agent. These facts were undisputed, and must be considered as conclusively established in the further consideration of the case.

The authority of the assessors to make the assessment in question is claimed to have been derived from section 1, c. 37, Laws 1855, which reads as follows: "All persons and associations doing business in the state of New York as merchants, bankers, or otherwise, either as principals or partners, whether special or otherwise, and not residents of this state, shall be assessed and taxed on all sums invested in any manner in said business the same as if they were residents of this state, and said taxes shall be collected from the property of the firms, persons, or associations to which they severally belong."

This statute clearly defines the limits of the power possessed by the assessment officers, and their jurisdiction depends upon the existence of the facts stated in the statute. To authorize an assessment under this statute, it is indispensable that the person assessed shall, in fact, have money invested in a business carried on by him in this state, either as a principal or partner. Assessors cannot acquire jurisdiction to make such assessments by determining that they have it, and their authority to act must always depend upon the existence of the jurisdictional facts described in the statute. The facts stated conclusively show that the defendant was not doing such business in the city of New York, either as a principal or a partner, and that he did not have any money invested in the business there carried on. That business was carried on by the corporation of which the defendant was agent, and the money invested in it was the property of that corporation. The court below conceded that, if the facts stated had been known to the tax commissioners, they could not lawfully have made an assessment against the defendant; but it was claimed that the act of the commissioners in making it was judicial and could not be assailed collaterally, and that the defendant should have adopted some means, either by appearing before the tax commissioners when they sat to review assessments, and urged his nonliability to taxation, or, by certiorari from the determination of the assessors, raised the question of his liability.

There is no prerogative of the government which is more liable to abuse than that which authorizes it to seize and appropriate the property of the citizen for public purposes, and none which is regarded

with more jealous scrutiny by the courts. The authority of its officers to exercise the powers of taxation has uniformly been carefully scrutinized and limited to the express warrant of the statute, and cannot be extended by implication or construction. This is especially the case where its demands may be enforced by fine and imprisonment, and it would be contrary to the traditions of our people, as well as to principles of justice and law, to permit the liberty of the citizen to be jeopardized by a strained and doubtful construction of a statute. The defendant has, confessedly, been assessed upon property which he did not own, and is now threatened with imprisonment, unless he pays the illegal exaction. The only authority the tax commissioners had to assess the personal property of a nonresident was in the event that he employed it in carrying on a business in this state, as principal or partner. But the defendant had been taxed upon an investment which he never made, and upon a business carried on by other parties. This has been done upon the theory not that he had property and was carrying on such business, but because he was negligent in failing to examine the assessment lists, and, by omitting to do so and obtaining a correction of them, has been rendered liable to the payment of a tax on property which he did not own. The property assessed could not have been taken for the payment of this tax, as it did not belong to the person against whom it was levied, and the strange anomaly is presented of an assessment against a person for property which he did not own, under an act which authorizes an assessment only upon his property invested in business, and in respect to property which could not be taken in payment for the tax, although such property alone is pointed out by the act as the fund from which the tax is to be collected. Upon such a foundation is built up a personal claim against the alleged taxpayer, which is sought to be enforced by imprisonment. The ground upon which it is claimed to be sustainable, is that the tax commissioners have decided that he was a taxpayer, and, in so doing, acted judicially, and therefore their determination cannot be attacked collaterally.

It is argued that, public notice by publication having been given that the assessment rolls of New York City had been completed and would be open for inspection and review at a certain time and place in that city, the defendant, having failed to examine them and to procure a correction of the erroneous assessment, was precluded from questioning the validity of such assessment in this proceeding. We are of the opinion that the defendant was under no obligation to examine the assessment lists of the city of New York. It is not claimed that the notices published by the assessors contained any intimation that an assessment had been made against the defendant, or that he had personal notice, in any other form, of the making of such assessment. There was no law making the defendant liable to taxation in New York, and no foundation for a claim that he knew, or had any reason to suppose, that an assessment had been

made against him. He was under no greater obligation to examine the assessment lists of New York City than any other of the thousands of citizens of other states who visited that city during the year 1883. A person subject to taxation in a particular place may well be held liable for an erroneous assessment if he neglects to examine the rolls and obtain correction of errors therein; but a nonresident, having no taxable property in such locality and no just reason to suppose he has been taxed, is under no such obligation. He may safely rely upon his immunity from taxation in any place where he does not reside, and is not compelled to anticipate and thwart the act of public officers proceeding without authority of law in such places. The published notices of the completion of assessment rolls, required by the statute, are intended for the information of taxpayers within the jurisdiction of the particular assessment officers, and can have no operation upon nonresidents of such locality who have no property liable to taxation therein.

We think the authorities are clearly adverse to the decision of the court below. It is conceded that the question depends upon the fact whether the assessors had jurisdiction to make the assessment. If they had not, then the assessment is confessedly void. Assessors are ministerial officers, and do not generally act judicially in the performance of their duties. Having, however, acquired jurisdiction of the person and subject-matter liable to be taxed, certain questions may arise which are necessarily judicial in character, and in respect to such questions their action is necessarily final, unless their determinations be directly assailed. Instances of such questions are the fixing of the value of property assessed, and determining the extent of a claim to exemption, where the person assessed is liable to be taxed. Weaver v. Devendorf, 3 Denio, 118.

The authorities in this state seem to be quite uniform, to the effect that the question whether persons or property are assessable under the statutes is a jurisdictional question, and is always open to inquiry when the authority to make an assessment is assailed.

The case of Dorn v. Backer, 61 N. Y. 261, cannot, we think, on principle, be distinguished from this case. That was an action against the assessor to recover damages for wrongfully assessing the plaintiff's farm, in the town of Ava. The farm lay partly in Ava, and partly in Boonville. It was assessable in the township where he resided. He had formerly occupied a house upon that part of his farm lying in the town of Ava. Subsequently, he removed into a small house built on the land in Boonville, and had apparently resided there some years. It was there declared: "It may be said now to be settled that assessors cannot acquire jurisdiction by deciding that they have it. Before assessing the plaintiff for taxation in the town of Ava, it was essential that he should be a resident of that town, and, if not, they had no jurisdiction." It was held that the action was sustainable.

In Bank v. City of Elmira, 53 N. Y. 49, the action was to recover

damages for the conversion of plaintiff's property. The defendant justified under an allegation that the property was taken by its collector to satisfy a tax duly imposed upon the capital of the bank by the assessors of the city. Under the law (chapter 761, Laws 1866) the capital of a bank was not assessable. The late Chief Judge Church, writing the opinion of the court, says: "It is claimed that the assessors had jurisdiction to make the assessment; that their act was judicial, and, although erroneous, is conclusive until reversed by a direct proceeding instituted for that purpose. This proposition cannot be predicated of this case, either in fact or in law. Some of the duties of assessors are judicial in their nature, and as to them, while acting within the scope of their authority, they are protected from attack, collaterally, to the same extent as other judicial officers; but they are subordinate officers, possessing no authority, except such as is conferred upon them by statute, and it is a well-settled and salutary rule that such officers must see that they act within the authority committed to them. * * * So, when their right to act depends upon the existence of some fact which they erroneously determine to exist, their acts are void. * * * This court held, in 15 N. Y. 316, that, if the assessors erred in determining whether a person was a taxable inhabitant of a town, they did so at their peril, and were liable to an action by the party aggrieved. This was upon the principle that the act, although judicial in its nature and requiring the exercise of judgment, was nevertheless necessary to confer jurisdiction, which could not be conferred by an erroneous decision."

The case of Mygatt v. Washburn, 15 N. Y. 316, referred to, was an action by the taxpayer against the assessor for an illegal assessment. The plaintiff had been a resident of the town of Oxford until the last of May, when he removed to the county of Oswego. The time for making assessments in Oxford covered the months of May and June and the plaintiff's name was entered on the assessment lists in May. It was held that the status of the taxpayer as to residence did not become irrevocably fixed until after July 1st. Judge Denio says: "The plaintiff, therefore, was not subject to the jurisdiction of the assessors. In placing his name on the roll, and adding thereto an amount as the value of his personal property, they acted without authority. They are, therefore, responsible to the plaintiff for the damages which ensued. It was not, in the view of the law, an error of judgment."

In view of the fact that the authorities on this point are all uniform, we will only refer to In re New York Catholic Protectory, 77 N. Y. 342, because it recognizes, as an established principle, that the determination by assessors that a person or his property are taxable, is jurisdictional, and that an error made by them in such determination against the taxpayer is fatal to the validity of the assessment. Judge Rapallo, writing the opinion of the court, says: "By the act amending their charter (section 3, c. 647, Laws 1866), it is provided that 'the real and personal estate belonging to, and used for the charitable pur-

poses of, said association shall be exempt from taxation.' That the land upon which the tax in question was imposed belonged to the petitioners, and was used for such charitable purposes, is alleged in the petition, and not controverted in any manner. The assessors, consequently, had no jurisdiction to assess that land; and, even if they be deemed to have determined as a fact that the land was not so used as to bring it within the exception, their determination was not conclusive, the fact being one upon which their jurisdicton depended. If the jurisdictional fact did not exist, the determination of the assessors could not establish jurisdiction in them."

The assessment officers in this case had authority to assess the property of a nonresident doing business in this state as a principal, or partner having money invested in the business, and in such case only. Their authority to assess depended upon the fact that he was engaged in business, and not upon appearances which might be deceptive and uncertain. The defendant, concededly, was not a principal or partner in any business conducted in this state, and had no money invested in such business. His principal might have been engaged in such business, and might have been liable to taxation; but even as to that there is some question. People ex rel. Parker Mills v. Commissioners of Taxes, 23 N. Y. 242. But the defendant was not only not liable to be assessed, but the case does not show that there were any reasonable grounds for supposing that he was engaged in a business making him liable to taxation. He was a nonresident, and did not own the property assessed, and did not appear to be carrying on business in any capacity except as the agent of a responsible principal located in another state.

Without discussing other questions in the case, which might possibly be reviewed upon the record, we are, for the reasons stated, of the opinion that the orders of the courts below should be reversed. The orders of the General and Special Terms should be reversed, and the application of the petitioner denied, with costs in all courts. All concur.[15]

DE LIMA v. BIDWELL.

(Supreme Court of United States, 1900. 182 U. S. 1, 21 Sup. Ct. 743. 45 L. Ed. 1041.)

In Error to the Circuit Court of the United States for the Southern District of New York to review a judgment sustaining a demurrer in an action removed from a state court and brought against the collector of the port of New York to recover back duties on goods imported from Porto Rico.

[15] Compare Easton v. Calendar, 11 Wend. (N. Y.) 90 (1833), ante, p. 297. See, also, Rooke v. Withers, 5 Coke Rep. 99b (1598); Nichols v. Walker, Cro. Car. 394 (1634); Terry v. Huntington, Hardres, 480 (1668).

Mr. Justice BROWN delivered the opinion of the court.[16]

This case raises the single question whether territory acquired by the United States by cession from a foreign power remains a "foreign country" within the meaning of the tariff laws.

1. Did the question of jurisdiction raised by the demurrer involve only the jurisdiction of the Circuit Court as a federal court, we should be obliged to say that the defendant was not in a position to make this claim, since the case was removed to the federal court upon his own petition. It is no infringement upon the ancient maxim of the law that consent cannot confer jurisdiction, to hold that, where a party has procured the removal of a cause from a state court upon the ground that he is lawfully entitled to a trial in a federal court, he is estopped to deny that such removal was lawful if the federal court could take jurisdiction of the case, or that the federal court did not have the same right to pass upon the questions at issue that the state court would have had if the cause had remained there. Defendant neither gains nor loses by the removal, and the case proceeds as if no such removal had taken place. Cowley v. Northern P. R. Co. 159 U. S. 569, 583, 16 Sup. Ct. 127, 40 L. Ed. 263, 267; Mansfield, C. & L. M. R. Co. v. Swan, 111 U. S. 379, 4 Sup. Ct. 510, 28 L. Ed. 462; Mexican Nat. R. Co. v. Davidson, 157 U. S. 201, 15 Sup. Ct. 563, 39 L. Ed. 672.

This, however, is more a matter of words than of substance, as the defendant unquestionably has the right to show that the state court had no jurisdiction, or that the complaint did not set forth facts sufficient to constitute a cause of action. This we understand to be the substance of the defense in this connection.

By Rev. St. § 2931 (U. S. Comp. St. 1901, p. 1933), it was enacted that the decision of the collector "as to the rate and amount of duties" to be paid upon imported merchandise should be final and conclusive, unless the owner or agent entered a protest and within thirty days appealed therefrom to the Secretary of the Treasury, and, further, that the decision of the Secretary should be final and conclusive, unless suit were brought within ninety days after the decision of the Secretary. By Rev. St. § 3011 (U. S. Comp. St. 1901, p. 1985), any person having made payment under such protest was given the right to bring an action at law and recover back any excess of duties so paid.

The law stood in this condition until June 10, 1890, when an act known as the customs administrative act was passed (Act June 10, 1890, c. 407, 26 Stat. 131 [U. S. Comp. St. 1901, p. 1886]), by which the above sections (Rev. St. §§ 2931, 3011) were repealed and new regulations established, by which an appeal was given from the decision of the collector "as to the rate and amount of duties chargeable upon imported merchandise," if such duties were paid under protest, to a Board of General Appraisers whose decision should be final and conclusive (section 14) "as to the construction of the law and the facts

[16] Only a portion of the opinion of Brown, J., is here printed.

respecting the classification of such merchandise and the rate of duty imposed thereon under such classification," unless within thirty days one of the parties applied to the Circuit Court of the United States for a review of the questions of law and fact involved in such decision. Section 15. It was further provided that the decision of such court should be final, unless the court were of opinion that the question involved was of such importance as to require a review by this court, which was given power to affirm, modify, or reverse the decision of the Circuit Court.

The effect of the customs administrative act was considered by this court in Re Fassett, 142 U. S. 479, 12 Sup. Ct. 295, 35 L. Ed. 1087, in which we held that the decision of the collector that a yacht was an imported article might be reviewed upon a libel for possession filed by the owner, notwithstanding the customs administrative act. It was held that the review of the decision of the Board of General Appraisers, provided for by section 15 of that act, was limited to decisions of the board "as to the construction of the law and the facts respecting the classification" of imported merchandise "and the rate of duty imposed thereon under such classification," and that it did not bring up for review the question whether an article be imported merchandise or not, nor, under section 15, is the ascertainment of that fact such a decision as is provided for.

Said Mr. Justice Blatchford: "Nor can the court of review pass upon any question which the collector had not original authority to determine. The collector had no authority to make any determination regarding any article which is not imported merchandise; and if the vessel in question here is not imported merchandise, the court of review would have no jurisdiction to determine any matter regarding that question, and could not determine the very fact which is in issue under the libel in the District Court on which the rights of the libelant depend. Under the customs administrative act the libelant, in order to have the benefit of proceedings thereunder, must concede that the vessel is imported merchandise, which is the very question put in contention under the libel, and must make entry of her as imported merchandise, with an invoice and a consular certificate to that effect." It was held that the libel was properly filed.

The question involved in this case is not whether the sugars were importable articles under the tariff laws, but whether, coming as they did from a port alleged to be domestic, they were imported from a foreign country; in other words, whether they were imported at all as that word is defined in Woodruff v. Parham, 8 Wall. 123, 132, 19 L. Ed. 382, 384. We think the decision in the Fassett Case is conclusive to the effect that, if the question be whether the sugars were imported or not, such question could not be raised before the Board of General Appraisers; and that whether they were imported merchandise for the reasons given in the Fassett Case that a vessel is not an importable article, or because the merchandise was not brought from a

foreign country, is immaterial. In either case the article is not imported.

Conceding, then, that section 3011 has been repealed, and that no remedy exists under the customs administrative act, does it follow that no action whatever will lie? If there be an admitted wrong, the courts will look far to supply an adequate remedy. If an action lay at common law, the repeal of sections 2931 and 3011, regulating proceedings in customs cases (that is, turning upon the classification of merchandise), to make way for another proceeding before the Board of General Appraisers in the same class of cases, did not destroy any right of action that might have existed as to other than customs cases; and the fact that by section 25 no collector shall be liable "for or on account of any rulings or decisions as to the classification of said merchandise or the duties charged thereon, or the collection of any dues, charges, or duties on or on account of said merchandise," or any other matter which the importer might have brought before the Board of General Appraisers, does not restrict the right which the owner of the merchandise might have against the collector in cases not falling within the customs administrative act. If the position of the government be correct, the plaintiff would be remediless; and if a collector should seize and hold for duties goods brought from New Orleans, or any other concededly domestic port, to New York, there would be no method of testing his right to make such seizure. It is hardly possible that the owner could be placed in this position. But we are not without authority upon this point.

The case of Elliott v. Swartwout, 10 Pet. 137, 9 L. Ed. 373, was an action of assumpsit against the collector of the port of New York to recover certain duties upon goods alleged to have been improperly classified. It was held that as the payment was purely voluntary, by a mutual mistake of law, no action would lie to recover them back, although it would have been different if they had been paid under protest. Said Mr. Justice Thompson: "Here, then, is the true distinction: when the money is paid voluntarily and by mistake to an agent, and he has paid it over to his principal, he cannot be made personally responsible; but if, before paying it over, he is apprised of the mistake, and required not to pay it over, he is personally liable." If the payment of the money be accompanied by a notice to the collector that the duties charged are too high and that the person paying intends to sue to recover back the amount erroneously paid, it was held that such action must lie "unless the broad proposition can be maintained, that no action will lie against a collector to recover back an excess of duties paid him, but that recourse must be had to the government for redress." The case recognized the fact that, with respect to money paid under a mistake of law, the collector stood in the position of an ordinary agent, and could be made personally liable in case the money were paid under protest.

This decision was made in 1836. Apparently in consequence of it an act was passed in 1839 requiring moneys collected for duties to be deposited to the credit of the Treasurer of the United States; and it was made the duty of the Secretary of the Treasury to draw his warrant upon the Treasurer in case he found more money had been paid to the collector than the law required. It was held by a majority of this court in Cary v. Curtis, 3 How. 236, 11 L. Ed. 576, that this act precluded an action of assumpsit for money had and received against the collector for duties received by him, and that the act of 1839 furnished the sole remedy. It was said of that case in Arnson v. Murphy, 109 U. S. 238, 240, 3 Sup. Ct. 184, 186, 27 L. Ed. 920, 921: "Congress, being in session at the time that decision was announced, passed the explanatory act of February 26, 1845, which, by legislative construction of the act of 1839, restored to the claimant his right of action against the collector, but required the protest to be made in writing at the time of payment of the duties alleged to have been illegally exacted, and took from the Secretary of the Treasury the authority to refund conferred by the act of 1839 (5 Stat. 349, 727, c. 22). This act of 1845 was in force, as was decided in Barney v. Watson, 92 U. S. 449, 23 L. Ed. 730, until repealed by implication by the act of June 30, 1864" (13 Stat. 214, c. 171, § 14), carried into the Revised Statutes as §§ 2931 and 3011.

In the same case of Arnson v. Murphy, 109 U. S. 238, 3 Sup. Ct. 184, 27 L. Ed. 920, it was decided that the common-law right of action against the collector to recover back duties illegally collected was taken away by statute, and a remedy given, based upon these sections, which was exclusive. The decision in Elliott v. Swartwout was recognized, but so far as respected customs cases (i. e., classification cases) was held to be superseded by the statutes. So in Schoenfeld v. Hendricks, 152 U. S. 691, 14 Sup. Ct. 754, 38 L. Ed. 601, it was held that an action could not be maintained against the collector, either at common law or under the statutes, to recover duties alleged to have been exacted, in 1892, upon an importation of merchandise, the remedy given through the Board of General Appraisers being exclusive.

The criticism to be made upon the applicability of these cases is that they dealt only with imported merchandise and with the duties collected thereon, and have no reference whatever to exactions made by a collector, under color of the revenue laws, upon goods which have never been imported at all. With respect to these the collector stands as if, under color of his office, he had seized a ship or its equipment, or any other article not comprehended within the scope of the tariff laws. Had the sugars involved in this case been admittedly imported that is, brought into New York from a confessedly foreign country, and the question had arisen whether they were dutiable, or belonged to the free list, the case would have fallen within the customs administrative act, since it would have turned upon a question of classification.

The fact that the collector may have deposited the money in the treasury is no bar to a judgment against him, since Rev. St. § 989 (U. S. Comp. St. 1901, p. 708), provides that, in case of a recovery of any money exacted by him and paid into the treasury, if the court certifies that there was probable cause for the act done, no execution shall issue against him, but the amount of the judgment shall be paid out of the proper appropriation from the treasury.

We are not impressed by the argument that, if the plaintiffs insisted that these sugars were not imported merchandise, they should have stood upon their rights, refused to enter the goods, and brought an action of replevin to recover their possession. It is true that, to prevent the seizure of the sugars, plaintiffs did enter them as imported merchandise; but any admission derivable from that fact is explained by their protest against the exaction of duties upon them as such. They waived nothing by taking this course. The collector lost nothing, since he was apprised of the course they would probably take. It is true that in the Fassett Case, 142 U. S. 479, 12 Sup. Ct. 295, 35 L. Ed. 1087, the proceeding was by libel for possession of the vessel which is analogous to an action of replevin at common law; but it would appear that Rev. St. § 934 (U. S. Comp. St. 1901, p. 689), would stand in the way of such a remedy here, since by that section "all property taken or detained by any officer or other person under authority of any revenue law of the United States shall be irrepleviable, and shall be deemed to be in the custody of the law, and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof." If the words "under authority of any revenue law" are to be construed as if they read "under color of any revenue law," it would seem that these sugars could not be made the subject of a replevin; but even conceding that replevin would lie, we consider it merely a choice of remedies, and that the plaintiffs were at liberty to waive the tort and proceed in assumpsit.

We are all of opinion that this action was properly brought. * * *

SECTION 72.—SAME—QUESTIONS OF LAW

NORTH GERMAN LLOYD S. S. CO. v. HEDDEN, Collector. SAME v. MAGONE, Collector.

(Circuit Court of United States, D. New Jersey, 1890. 43 Fed. 17.)

WALES, J.[17] The plaintiff, a duly organized corporation under the laws of the Hanseatic republic of Bremen, which is a part of the German empire, is the owner of a line of ocean steamships, plying regu-

[17] Only a portion of the opinion of Wales, J., is printed.

larly between the ports of Bremen and New York, and brings these actions, under section 2931, Rev. St. (U. S. Comp. St. 1901, p. 1933), to recover the amount of certain tonnage dues, alleged to have been unlawfully collected from said ships during the period extending from June 26, 1884, to July 28, 1888, and while the defendants were successively collectors of customs at the last-named port. The vessels cleared from Bremen for New York via Southampton, Eng., stopping at or near the latter place temporarily, to discharge cargo and passengers, and to take on board additional cargo, passengers, and mails. The consignees of the vessels paid the dues, in every instance, under protest, and the plaintiff appealed to the Secretary of the Treasury, and finally, at the suggestion of the latter officer and with the concurrence of the department of justice, brought these actions to determine the authority of the defendants. * * *

By article 9 of the treaty of December 20, 1827, between the United States and the Hanseatic republics, "the contracting parties * * * engage mutually not to grant any particular favor to other nations, in respect of commerce and navigation, which shall not immediately become common to the other party." Public Treaties, 400. Article 9 of the Prussian-American treaty of May 1, 1828 (Pub. Treaties, 656), contains a like stipulation. These treaties have been held by both the American and German governments to be valid for all Germany. On the 26th of January, 1888, the President, in virtue of the authority vested in him by section 11 of the act of June 19, 1886, c. 421, 24 Stat. 81 (U. S. Comp. St. 1901, p. 2850), issued his proclamation, wherein, after reciting that he had received satisfactory proof that no tonnage or lighthouse dues, or any equivalent tax or taxes whatever, are imposed upon American vessels entering the ports of the German empire, either by the imperial government or by the governments of the German maritime states, and that vessels belonging to the United States are not required, in German ports, to pay any fee or due of any kind or nature, or any import duty higher or other than is payable by German vessels or their cargoes, did "declare and proclaim that from and after the date of this my proclamation shall be suspended the collection of the whole of the duty of six cents per ton * * * upon vessels entered in the ports of the United States from any of the ports of the empire of Germany, * * * and the suspension hereby declared and proclaimed shall continue so long as the reciprocal exemption of vessels belonging to citizens of the United States and their cargoes shall be continued in the said ports of the empire of Germany, and no longer."

The commissioner of navigation, in his circular letter No. 19, dated February 1, 1888, and approved by the Secretary of the Treasury, addressed to the collectors of customs and others, decided that the President's proclamation does not apply to vessels which entered before the date of the proclamation, and that only those German vessels "arriving directly from the ports of the German empire may be admit-

ted under the proclamation without the payment of the dues therein mentioned." The commissioner of navigation claims authority to make this decision by virtue of section 3 of the act of Congress of July 5, 1884, c. 221, 23 Stat. 119 (U. S. Comp. St. 1901, p. 199), entitled "An act to constitute a bureau of navigation in the Treasury Department," which reads as follows: "That the commissioner of navigation shall be charged with the supervision of the laws relating to the admeasurement of vessels, and the assigning of signal letters thereto, and of designating their official number; and on all questions of interpretation, growing out of the execution of the laws relating to these subjects, and relating to the collection of tonnage tax, and to the refunding of such tax when collected erroneously or illegally, his decision shall be final."

The plaintiff's vessels were German vessels, and on the 19th day of June, 1886, and thereafter until now, the government of Germany exacted no tonnage tax or taxes whatever on vessels of the United States arriving in German ports. * * *

As to the time when the act of June 19, 1886, went into operation, whether immediately from and after the date of its approval, or not until the date of the President's proclamation, and also whether the voyages of the plaintiff's vessels from Bremen to New York must be made "directly," and without stoppage at an intermediate port, in order to be exempted from the imposition and payment of tonnage dues, the decision of these questions by the commissioner of navigation must be held to be conclusive, unless so much of section 3 of the act of July 5, 1884, which makes his decision final in such matters, is unconstitutional. Much learning and ability have been employed by plaintiff's counsel to establish the invalidity of this portion of the act, which invests a department officer with such unlimited judicial power, and by which he is enabled to decide all contests in relation to alleged illegal dues, ex parte, and absolutely. On the other hand, the labor and responsibility of the court have been increased by the omission of the defendant's counsel to furnish any assistance towards the solution of the questions, and permitting them to pass sub silentio. The subject, however, is not res integra. In Cary v. Curtis, 3 How. 236, 11 L. Ed. 576, the Supreme Court had under consideration the constitutionality of the third section of the act of Congress of March 3, 1839, entitled "An act making appropriations for the civil and diplomatic expenses of the government for the year 1839," by which the Secretary of the Treasury was authorized to finally decide when more duties had been paid to any collector of customs, or to any person acting as such, than the law required, and to draw his warrant in favor of the person or persons entitled for a refund of the amounts so overpaid. The opinion of the court discusses very ably and at much length the questions involved in that case.

A few sentences taken from the opinion will indicate the grounds upon which the validity of the act of 1839 was sustained: "We have

no doubts [say the court] of the objects or the import of that act. We cannot doubt that it constitutes the Secretary of the Treasury the source whence instructions are to flow; that it controls both the position and the conduct of the collectors of the revenue; that it has denied to them any right or authority to retain any portion of the revenue for purposes of contestation or indemnity; has ordered and declared those collectors to be the mere organs of receipt and transfer, and has made the head of the Treasury Department the tribunal for the examination of claims for duties said to have been improperly paid. * * * It is contended, however, that the language and the purposes of Congress, if really what we hold them to be declared in the statute of 1839, cannot be sustained, because they would be repugnant to the Constitution, inasmuch as they would debar the citizen of his right to resort to the courts of justice. * * * The objection above referred to admits of the most satisfactory refutation. This may be found in the following positions, familiar in this and in most other governments, viz. that the government, as a general rule, claims an exemption from being sued in its own courts. That although, as being charged with the administration of the laws, it will resort to those courts as means of securing this great end, it will not permit itself to be impleaded therein, save in instances forming conceded and express exceptions. Secondly, in the doctrine, so often ruled in this court, that the judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good. To deny this position would be to elevate the judicial over the legislative branch of the government, and to give to the former powers limited by its own discretion merely. It follows, then, that the courts created by statute must look to the statute as the warrant for their authority. * * * The courts of the United States are all limited in their nature and constitution, and have not the powers inherent in courts existing by prescription or by the common law. * * * The courts of the United States can take cognizance only of subjects assigned to them expressly or by necessary implication; a fortiori, they can take no cognizance of matters that by law are either denied to them, or expressly referred ad aliud examen."

This exposition of the origin and extent of the jurisdiction of the courts of the United States was reaffirmed in Sheldon v. Sill, 8 How. 449, 12 L. Ed. 1147, where it was held that courts created by statute can have no jurisdiction but such as the statute confers. The right

given by section 2931, Rev. St., to sue for overpaid dues is taken away by the act of July 5, 1884, and the power to determine controversies arising from alleged exactions by collectors is deposited with the commissioner of navigation. Such is the effect of the decisions just cited, and which, as long as they are not overruled by the tribunal which made them, must be obeyed as the law of the land. The authorities referred to by plaintiff's counsel are cases where department officers, in making regulations to be observed by their subordinates, exceeded their statutory power, but in no one instance was it pretended that the officer was clothed with the power to make a final decision in contested matters. It was perhaps unnecessary, in view of Cary v. Curtis, and Sheldon v. Sill, that I should have done more than acquiesce in the doctrines there announced, and support the validity of the act of July 5, 1884, without further discussion, but the large amount of money involved in the present actions, and the earnestness and force with which the plaintiff's claims have been pressed, have induced me to make a more extended presentation of them than was at first designed. It must be borne in mind that this court is not called on to express any opinion on the justice or expediency of placing such unlimited power in the hands of the commissioner of navigation as is conferred by the act of July 5, 1884. The duty of the court is to discover whether the act is in conflict with the Constitution, and, on being satisfied that it is not, to judge accordingly. To pursue any other course would be not only extra-judicial, but also improper, in assuming to criticise the wisdom of Congress in making the law. Neither is the court required to say whether the commissioner of navigation is or is not correct in his interpretation of the law. Congress has seen fit to constitute him the final arbiter in certain disputes, and Congress alone can supply a remedy for any wrong which may have arisen from his construction of the law relating to the collection of tonnage due.

Let judgment be entered in each case for the defendant.

LAIDLAW v. ABRAHAM, Collector.

(Circuit Court of United States, D. Oregon, 1890. 43 Fed. 297.)

DEADY, J.[18] The plaintiff, James Laidlaw, doing business as "James Laidlaw & Co.," brings this action against Hyman Abraham, collector of customs at the port of Portland, in the district of Wallamet to recover the sum of $793.50, alleged to have been wrongfully exacted by the defendant from the British ship Largo Law, as a tonnage tax. * * *

The only other point made in support of the demurrer is that the decision on the appeal to the Secretary was, under Act July 5, 1884,

[18] Only a portion of the opinion of Deady, J., is printed.

c. 221, 23 Stat. 118 (U. S. Comp. St. 1901, p. 199), in fact made by the commissioner of navigation, and is by said act made final, and is therefore a bar to this action.

This act is entitled "An act to constitute a bureau of navigation in the Treasury Department." The commissioner created by it is charged, "under the direction of the Secretary of the Treasury" with many duties concerning "the commercial, marine, and merchant seamen of the United States;" and, by section 3 thereof, "with the supervision of the laws relating to the admeasurement of vessels and the assigning of signal letters thereto, and of designating their official number; and on all questions of interpretation growing out of the execution of the laws relating to these subjects, and relating to the the collection of tonnage tax, and to the refund of such tax when collected erroneously or illegally, his decision shall be final."

At first blush it may appear that this provision in the Act of 1884 repealed so much of sections 2931, 3011, Rev. St. (U. S. Comp. St. 1901, pp. 1933, 1985), as gives the person paying such illegal tax the right of redress in the courts, after an unsuccessful appeal to the department. But, on reflection, I am satisfied that the word "final" is used in this connection with reference to the department, of which the commissioner is generally a subordinate part.

In my judgment, the purpose of the provision is to relieve the head of the department from the labor of reviewing the action of the commissioner in these matters, to sidetrack into the bureau of navigation the business of rating vessels for tonnage duties, and deciding questions arising on appeals from the exaction of the same by collectors. The appeal is still taken to the Secretary of the Treasury, as provided in section 2931, but goes to the commissioner for decision, whose action is "final" in the department, as it would not be but for this provision of the statute.

This being so, and nothing appearing to the contrary, it follows that the right of action given to the unsuccessful appellant in such cases is not taken away. The appeal to the department has simply been decided by the commissioner, rather than the Secretary, and, that having been adverse to the plaintiff, his right of action against the collector attaches at once.

And, even if it were plain that Congress in the passage of this act intended to deprive the plaintiff of all redress in the courts, might he not in good reason claim that the act is so far unconstitutional and void, as being contrary to the fifth amendment, which declares that no person shall be deprived of his "property without due process of law?"

The demurrer is overruled.

SECTION 73.—SAME—QUESTIONS OF FACT

HARRINGTON v. GLIDDEN.

(Supreme Judicial Court of Massachusetts, 1901. 179 Mass. 486, 61 N. E. 54, 94 Am. St. Rep. 613.)

Exceptions from superior court, Middlesex county.

Action by one Harrington, as collector of taxes, against one Glidden. From a judgment for plaintiff, defendant brings exceptions. Overruled.

HAMMOND, J.[19] In this action the plaintiff, as collector, seeks to recover a tax assessed upon the defendant, as trustee. It is contended by the defendant that, even if he was a trustee, such was the nature and location of the property, and his relation to it, that he was not taxable as such.

The first question is whether this ground of the defense is open to the defendant in this action. The assessment and collection of taxes is regulated by statute. The assessors are public officers, and, while their duties are of a quasi judicial nature, their jurisdiction is limited, based sometimes upon the residence of the person assessed, or of some other person interested in the property, and sometimes upon the situation of the property. Without reciting in detail the statutes, it is sufficient to say that they provide that each person may bring in a sworn list of the personal property for which he in any capacity should be taxed, and this list is to be received by the assessors as true, except as to valuation, unless he, being required thereto by the assessors, refuses to answer on oath all necessary inquiries as to the nature and amount of his property. In case a person does not bring in a list, the assessors shall ascertain, as nearly as possible, his taxable property, and "make an estimate thereof at its just value, according to their best information and belief," and "such estimate shall be conclusive," except in certain cases not here material. Pub. St. c. 11, §§ 38–42. Any person aggrieved by an assessment may apply for an abatement to the assessors, and, by appeal from their decision, to the county commissioners or superior court, and on questions of law may reach this court; but no person shall have an abatement unless he files a list, as above provided. Id. §§ 69–72; St. 1890, c. 127.

This plain, adequate, and complete remedy for the correction of errors, whether of law or fact, is the only one provided by our statutes; and when the assessors are acting within their jurisdiction, it must be regarded as exclusive, in accordance with the well-known

[19] Only a portion of the opinion of Hammond, J., is printed.

rule that "when a new right is created by statute, which at the same time provides a remedy for any infringement of it, that remedy must be pursued." Osborn v. Danvers, 6 Pick. 98, 99.

But when the assessors are acting outside their jurisdiction, their acts are absolutely void. Where, for instance, the tax ordered is illegal because for a purpose not authorized by law, the assessment is void. The assessors have no jurisdiction. Bangs v. Snow, 1 Mass. 181; Stetson v. Kempton, 13 Mass. 272, 7 Am. Dec. 145.

So where the assessment is upon a nonresident for personal property, claimed, by reason of its location in the town where the assessment is made, to be taxable there, if it appears that the nonresident had no personal property assessable there, the tax is wholly void, even if he had taxable real estate there. The reason is that, the person assessed not being resident in the town where the assessment is made, and so not within the jurisdiction of the assessors, their right to assess him, so far as respects personal property, depends upon whether he has assessable personal property in the town. Unless he has such property there, their acts are void for want of jurisdiction.

Preston v. City of Boston, 12 Pick. 7, a leading case, affords a good illustration of the application of this principle. The plaintiff being domiciled in Medford, and having taxable personal estate, but having in Boston only real estate, was taxed in the latter place for both real and personal estate. He paid the taxes, and in an action to recover back the money it was held that, while the real estate tax was valid the personal estate tax was invalid, and he recovered that back. The ground of the decision as to the personal property was that the plaintiff was not an inhabitant of Boston, and so not liable to be taxed there at all on his personal property. As to that the assessors had no jurisdiction. In giving the opinion, Shaw, C. J., said: "One not liable—not domiciled—is not within the jurisdiction of the assessors any more than a stranger from another state who should happen to be lodging at a hotel when the tax was assessed. The whole proceeding, therefore, in regard to him was without authority ab initio." See, also, Sumner v. Dorchester Parish, 4 Pick. 361; Inglee v. Bosworth, 5 Pick. 498, 16 Am. Dec. 419.

Where, however, there is personal property of a nonresident which is taxable in the town where it is situated, the assessors of that town have jurisdiction, and consequently the only remedy of the person aggrieved is by abatement. Little v. Greenleaf, 7 Mass 236; Gray v. Kettell, 12 Mass. 161. Again, where a corporation owns real and personal estate, and is taxable for the real, and not for the personal, estate, a tax upon the personal estate is absolutely void. Manufacturing Co. v. Amesbury, 17 Mass. 461; Boston Water Power Co. v. City of Boston, 9 Metc. 199; Salem Iron Co. v. Inhabitants of Danvers, 10 Mass. 514—the ground of the decision in these cases being that the corporation is not an inhabitant of the town for purposes of taxation. And the same principle is applied where the

assessors undertake to assess a tax in excess of what is called for or is allowed by law. Joyner v. Inhabitants of Egremont School Dist. No. 3, 3 Cush. 567; Cone v. Forrest, 126 Mass. 98.

These and similar cases all proceed upon the principle that an assessment made by assessors who have no jurisdiction is not the assessment authorized by statute. It is no assessment at all, and is absolutely void. As it is not the statutory proceeding, the statutory remedy is not exclusive.

Such an assessment, therefore, can be attacked collaterally in an action of tort against the assessors, where such an action will lie, or in an action against the town to recover back the money paid, or in defense to an action by the collector. These general remedies are not for those who are aggrieved by assessors acting within their jurisdiction, but are allowable to redress wrongs inflicted by persons who pretend to be assessors, but who are not such, because acting without jurisdiction.

Where, however, the tax is for a legal purpose, and the assessors have jurisdiction, whether it is based upon the fact that the person assessed be an inhabitant of the town where the assessment is made, or upon the situation of the property, or any other jurisdictional fact shown to exist, and they proceed essentially in accordance with the statutes, their decision as to the nature and amount of the taxable property of a person who has not brought in a list is valid. It cannot be attacked in any collateral proceeding, but must stand until changed in a proceeding under the statute for abatement. There are sound and obvious reasons for this rule, which are set forth at some length in Lincoln v. City of Worcester, 8 Cush. 55, 65, 66 [ante, p. 359].

Among the numerous cases where the doctrines above stated have been applied by this court, see, in addition to those already cited, Bates v. City of Boston, 5 Cush. 93; Howe v. Same, 7 Cush. 273; Bourne v. Same, 2 Gray, 494; Ingram v. Cowles, 150 Mass. 155, 23 N. E. 48; Carleton v. Ashburnham, 102 Mass. 348.

The defendant in the case at bar was an inhabitant of Lowell, and he had taxable personal property there. The only list he brought to the assessors was that of February 24, 1890, several months after the warrant had been committed to the collector, and even that purported to relate only to the property held by him as trustee. Being an inhabitant of the city, and having taxable personal property there, he was within the jurisdiction of the assessors. While the tax was in part against him as an individual, and in part as trustee, still it was all a personal tax. If valid, the collector could sue, distrain, or arrest, as well for the one part as for the other.

The assessors called for a sworn list of taxable personal property. Such a list should contain all such property held by a person either as an individual or in a representative capacity. In the absence of

such a list from the defendant, the assessors proceeded to consider his case. They had before them not only the question whether he was taxable for any personal property held by him as an individual, but also whether he was taxable for any such property held by him in a representative capacity. The whole case was before them, and it was their duty to investigate and decide it. That duty they performed, and they decided that he had taxable personal property, not only as an individual, but as a trustee, and they made an estimate thereof. The jury have found that in performing this work they "ascertained, as nearly as possible, the particulars of the personal estate held by the defendant as trustee, for the purpose of making this assessment," and that, "having obtained these particulars, they estimated such property at its just value, according to their best information and belief."

We are of opinion that the evidence fully justifies the finding. Indeed, the assessors seem to have been impressed with the importance and magnitude of the question, and to have made unusual efforts to get at the facts, both as to the nature and value of the property. It is true that a tax upon real estate is separate and distinct from that on personal estate (Preston v. City of Boston, ubi supra), but we do not think the statutes intended that there should be a division of the tax on personal estate, so far as concerns the remedy for a person aggrieved.

We are not unmindful of the case of Dorr v. City of Boston, 6 Gray, 131. In that case it appeared that the plaintiff was a woman, and had no taxable property in this state. As to whether the case of Preston v. City of Boston, ubi supra, was rightly interpreted in that case, see Lincoln v. City of Worcester, 8 Cush. 62, and Bates v. City of Boston, 5 Cush. 97.

So far, therefore, as respects the nature and value of the property, and his relation to it, the grievance of the plaintiff, if any, is one of overvaluation, and his only remedy is by the statutory proceeding for abatement. He cannot avail himself of this portion of his defense in this action. Pierce v. Eddy, 152 Mass. 594, 596, 26 N. E. 99. * * *

The defendant's brief contains an elaborate argument in support of the proposition that our statutes relating to the assessment of taxes are unconstitutional, because they do not give the party assessed an opportunity to be heard. But he does have full opportunity to be heard before the assessing board, if he desires it, before the demand becomes conclusively established against him, and that is enough. Cooley, Tax'n, pp. 361, 363, 364, and cases cited.[20]

There was ample evidence of a demand upon which to base interest, and, in the absence of anything to the contrary in the brief of the defendant, we consider the exception on that point waived.

[20] On this point, see Glidden v. Harrington, 189 U. S. 255, 23 Sup. Ct. 574, 47 L. Ed. 798 (1903).

Without going over the exceptions further in detail, it is sufficient to say that we see no error of law made by the presiding judge at the trial.

Exceptions overruled.[21]

[21] See Weber v. Baird, 208 Ill. 209, 70 N. E. 231 (1904): "We think a court of equity may revise the decision of the board of review assessing property to a taxpayer as having been owned by him and subject to taxation and omitted from the schedule prepared by him. The manner in which the board of review conducts its investigation is such that the taxpayer is not advised of the proofs heard or information obtained by the board relative to the ownership by him of property said to have been omitted from the schedule, nor has he an opportunity to contest the truth of such proof or such information before the board. He cannot appeal from any decision of the board, other than from a decision that certain property is not exempt from assessment for taxation.† Dutton v. Board of Review, 188 Ill. 386, 58 N. E. 953. Equity will therefore afford a remedy, and hear and determine whether the board correctly decided that the taxpayer was the owner of the property which the board assessed against him as having been omitted by him from his schedule. The inquiry in such an equitable proceeding is, what property did the board decide the taxpayer owned and had omitted from his schedule, and did he own that property? What the board decided is to be determined by the record made by the board of its decision. A taxpayer seeking the aid of equity must therefore show the record made by the board, and then he will be heard to show that he did not own the property there specified in the record. If, in fact, the board did not enter its decision on the assessment books, or if its decision did not show on such books the kind and class of property said to have been omitted, such failure would vitiate the assessment, unless in some way cured. But a taxpayer cannot ignore the record made by the board of review, which, if lawfully rendered, would show specifically the property or class of property which the board decided the taxpayer owned and had not listed for assessment, and be allowed to overturn the decision by seeking, in a general way, to deny that he had any other property than that he had listed."

See, also, Vittum v. People, 183 Ill. 154, 55 N. E. 689 (1899), assessing too high a rate.

Section 15 of the tariff act of June 10, 1890, allows an appeal from the decision of the Board of General Appraisers, as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, to the Circuit Court, for a review of the questions of law and fact involved in such decision. However, findings of the appraisers upon conflicting evidence are treated much like findings of a jury, and are set aside only if clearly against the evidence. In re Kursheedt Mfg. Co. (C. C.) 49 Fed. 633 (1892); In re White (C. C.) 53 Fed. 787 (1893). Method of proof cannot be controlled by treasury regulations. Pascal v. Sullivan (C. C.) 21 Fed. 496 (1884).

† Compare the principal case Harrington v. Glidden, where there was an appeal from the action of the assessors.

SECTION 74.—SAME—QUESTIONS OF VALUE

SPENCER & GARDNER v. PEOPLE.

(Supreme Court of Illinois. 1873. 68 Ill. 510.)

Appeal from the circuit court of Will county.

This was an application by the collector of Will county, to the county court of that county, for judgment against certain lands for taxes due thereon, for the year 1871, and costs. The case was taken by appeal to the circuit court.

The landowners filed the following objections to the rendition of judgment: First, that the assessment was not in compliance with the Constitution, which provides that taxes must be so levied as to be uniform, and in proportion to the value of the property upon which they operate; second, that the property was not assessed at its true value, being assessed several times higher than property of equal value adjoining the same.

The defendants below offered to prove the truth of their objections, which the court refused to allow, on the ground that the defendants had waived the objections by not making them before the proper boards of review, and rendered judgment against the lands and lots for the taxes assessed thereon, and the defendants appealed.

Mr. Justice SHELDON delivered the opinion of the court.

The question presented by this record is whether, upon an application for judgment against real estate for delinquent taxes, the objection may be made that there was too high a valuation placed upon the land by the assessor, in making the assessment.

The Constitution provides that the General Assembly shall provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property—such value to be ascertained by some person or persons, to be elected or appointed in such manner as the General Assembly shall direct, and not otherwise.

The provision of the Constitution has respect to the laws which should be passed by the Legislature for the imposition of taxes, and not to the practical working of the laws. The framers of the Constitution could not have contemplated any such consequence as that a tax levy should be void, in case an assessor should happen to omit to assess any taxable property, or should make an incorrect valuation of any property, whereby would be produced the result that every person would not actually pay a tax in proportion to the value of his property. There is no objection made that the revenue law is not framed in accordance with the constitutional principle.

The assessor is the officer who has been provided by the Legislature for fixing the valuation of property for the purpose of taxation.

No appeal to any court is provided from the assessor's judgment in fixing the value of property for taxation,[22] nor has any express authority been conferred upon a court to revise such valuation, or to correct an assessment, or order a new one, or to make a rebate of any tax.

And we are of opinion that the power does not belong to any court to revise the assessment made by an assessor, and change or set aside any valuation of property made by him, where his judgment has been honestly exercised, and upon a right basis. To do so would seem to be to arrogate the power of ascertaining the value of property for taxation, which ascertainment of value, the Constitution declares, shall be by some person or persons designated by the General Assembly, and not otherwise.

The Legislature has provided a special board for the review of assessments in the matter of valuation, as follows: The assessor, town clerk and supervisor shall attend at the time and place specified in the notice (before directed to be given), and on the application of any person conceiving himself aggrieved they shall review the assessment; and when the person so objecting thereto shall make an affidavit that the value of his personal estate does not exceed a certain sum specified in such affidavit, the assessor shall reduce the assessment to the sum specified in such affidavit; and if he, or any other one, objects to the valuation put upon any of their real estate, the board shall hear the objections, and may reduce the same if a majority of the board think it advisable, and in such case the assessor shall correct his list. Laws 1861, p. 242. This was the law in force at the time this assessment was made, and the appellant should have applied to that board for the correction of any overvaluation of his property.

An omission to assess some other persons liable to taxation, or to assess a portion of the taxable property of others, would be an objection of a like character with the one here made, as the effect would be the same, though it might be less in degree, as that of an overvaluation, to wit, to cause the complaining taxpayer to bear an undue proportion of the burthen of taxation. Yet it has been held that such an omission would not affect the validity of a tax. Merritt et al. v. Farris et al., 22 Ill. 303; Dunham et al. v. City of Chicago, 55 Ill. 357.

In the case of Albany & West Stockbridge R. Co. v. Town of Canaan, 16 Barb. (N. Y.) 244, it was held that the action of assessors, so long as they confine themselves within the statute rule,

[22] See, as to earlier law, Bureau County v. C. B. & Q. R. Co., 44 Ill. 229 (1867).

is conclusive, however grossly they may err in estimating the amount, and that the tax based upon the assessment is like a judicial sentence, and can be assailed only for fraud or want of jurisdiction. So it was held, in Weaver v. Devendorff, 3 Denio (N. Y.) 117, that in fixing the value of taxable property by an assessor, the power exercised is, in its nature, purely judicial.

In City of Chicago v. Burtice et al., 24 Ill. 489, it was said that the court would inquire whether the commissioners for assessment fraudulently valued the property above its true value, but that if they honestly estimated property too high or too low, the court would not disturb the assessment; and see, to the like effect, Elliott v. City of Chicago, 48 Ill. 293, and Jenks et al. v. City of Chicago, 48 Ill. 296. The case of Creote et al. v. City of Chicago, 56 Ill. 423, which is relied on by appellant's counsel, we do not regard as materially variant from the view here expressed. It was only held there that the defense of fraud in the making of the assessment might be made, as also that the assessment was made on a wrong basis, in violation of the statute and the Constitution.

In the present case there was no suggestion of fraud, or that the assessment was made on a wrong basis. The defense against the entry of judgment, as offered, we must regard as simply one of an excess of valuation, made in the honest exercise of the judgment of the assessor, and we are of opinion it was rightly excluded by the court.

The judgment is affirmed.

Judgment affirmed.[23]

[23] Accord: New Orleans v. Railroad Co., 37 La. Ann. 45 (1885); Rockland v. Rockland Water Co., 82 Me. 188, 19 Atl. 163 (1889); State v. Sadler, 21 Nev. 13, 23 Pac. 799 (1890); Stanley v. Supervisors of Albany, 121 U. S. 535, 7 Sup. Ct. 1234, 30 L. Ed. 1000 (1887); Shumway v. Baker Co., 3 Or. 246 (1870).

City of Chicago v. Burtice, 24 Ill. 489, 492 (1860): "It is nothing less than a legal fraud if the commissioners fix a valuation upon property above its real value, for the purpose of evading the provisions of the law, which forbids them to assess property more than three per cent. in any one year. It is true that the court ought not willingly to ascribe to the commissioners such motives; but when an outrageous valuation is shown, where, without it, the amount desired could not be assessed within the three per cent., it would seem to leave the court at liberty to draw no other conclusion. * * * We hold, without hesitation, that this is a proper subject of inquiry, and, when established, constitutes a good defense. As no mathematical rule can be applied to determine, with certainty, the value of real estate, and especially unimproved city property, it must be expected that the judgments of men will differ, and, if commissioners honestly estimate property too high or too low, the court will not disturb it; but when an assessment is made so wide of the true value, as established by witnesses, as to raise the presumption that it was overestimated from design, and especially when the court can see the motives prompting to such design, it will not and ought not to hesitate so to find. The court did not err in admitting proof of the value of the property."

See, also, Burton Stock Car Co. v. Traeger, 187 Ill. 9, 58 N. E. 418 (1900); State Board of Equalization v. People, 191 Ill. 528, 61 N. E. 339, 58 L. R. A. 513 (1901), valuation too low.

HILTON v. MERRITT.

(Supreme Court of United States, 1884. 110 U. S. 97, 3 Sup. Ct. 548, 28 L. Ed. 83.)

WOODS, J.[24] * * * The question presented by the exception of plaintiffs is whether the valuation of merchandise made by the customs officers under the statutes of the United States for the purpose of levying duties thereon is, in the absence of fraud on the part of the officers, conclusive on the importer, or is such valuation reviewable in an action at law brought by the importer to recover back duties paid under protest? * * *

The provisions of the statute law show with what care Congress has provided for the fair appraisal of imported merchandise subject to duty, and they show also the intention of Congress to make the appraisal final and conclusive. When the value of the merchandise is ascertained by the officers appointed by law, and the statutory provisions for appeal have been exhausted, the statute declares that the "appraisement thus determined shall be final and deemed to be the true value, and the duties shall be levied thereon accordingly." This language would seem to leave no room for doubt or construction.

The contention of the appellants is that after the appraisal of merchandise has been made by the assistant appraiser, and has been reviewed by the general appraiser, and a protest has been entered against his action by the importer, and the collector has appointed a special tribunal, consisting of a general and merchant appraiser, to fix the value, and they have reported each a different valuation to the collector, who has decided between them and fixed the valuation upon which the duties were to be laid, that in every such case the importer is entitled to contest still further the appraisement and have it reviewed by a jury in an action at law to recover back the duties paid.

After Congress has declared that the appraisement of the customs officers should be final for the purpose of levying duties, the right of the importer to take the verdict of a jury upon the correctness of the appraisement should be declared in clear and explicit terms. So far from this being the case, we do not find that Congress has given the right at all. If, in every suit brought to recover duties paid under protest, the jury were allowed to review the appraisement made by the customs officers, the result would be great uncertainty and inequality in the collection of duties on imports. It is quite possible that no two juries would agree upon the value of different invoices of the same goods. The legislation of Congress, to which we have referred, was designed, as it appears to us, to exclude any such method of ascertaining the dutiable value of goods.

[24] Only a portion of the opinion of Woods, J., is printed.

This court, in referring to the general policy of the laws for the collection of duties, said in Bartlett v. Kane, 16 How. 263, 14 L. Ed. 931: "The interposition of the courts in the appraisement of importations would involve the collection of the revenue in inextricable confusion." And, referring to section 3 of the act of March 3, 1851, which is reproduced in section 2930, Revised Statutes, this court declared, in Belcher v. Linn, 24 How. 508, 16 L. Ed. 754, that, in the absence of fraud, the decision of the customs officers "is final and conclusive, and their appraisement, in contemplation of law, becomes, for the purpose of calculating and assessing the duties due to the United States, the true dutiable value of the importation." To the same effect, see Tappan v. United States, 2 Mason, 393, Fed. Cas. No. 13,749, and Bailey v. Goodrich, 2 Cliff. 597, Fed. Cas. No. 735.

The appellants contend, however, that the right to review the appraisement of the customs officers by a jury trial is given to the importer by sections 2931 and 3011 of the Revised Statutes. The first of these sections provides that on the entry of any merchandise the decision of the collector as to the rate and amount of duties shall be final and conclusive, unless the importer shall, within two days after the ascertainment and liquidation of the proper officers of the customs, give notice in writing to the collector on each entry, if dissatisfied with his decision, setting forth distinctly and specifically the ground of his objection thereto, and shall within thirty days after such ascertainment and liquidation appeal therefrom to the Secretary of the Treasury, and the decision of the Secretary in such appeal shall be final and conclusive, and such merchandise shall be liable to duty accordingly, unless suit shall be brought within ninety days after such decision of the Secretary of the Treasury. Section 3011 provides that any person who shall have made payment under protest of any money as duties, when such amount of duties was not, or was not wholly, authorized by law, may maintain an action, which shall be triable by jury, to ascertain the validity of such demand and payment of duties, and to recover back any excess so paid; but no recovery shall be allowed in such action unless a protest and appeal shall have been taken as prescribed in section 2931.

The argument is that by these sections the appraisement which had been declared final by section 2930 is opened for review by a jury trial. Such is not, in our opinion, a fair construction of this legislation. Considering the acts of Congress as establishing a system, and giving force to all the sections, its plain and obvious meaning is that the appraisement of the customs officers shall be final, but all other questions relating to the rate and amount of duties may, after the importer has taken the prescribed steps, be reviewed in an action at law to recover duties unlawfully exacted. The rate and amount of duties depend on the classification of the imported merchandise; that is to say, on what schedule it belongs to. Ques-

tions frequently arise whether an enumerated article belongs to one section or another, and section 2499 of the Revised Statutes provides that there shall be levied on every nonenumerated article which bears a similitude either in material, quality, texture, or the use to which it may be applied to any enumerated article chargeable with duty, the same rate of duty which is levied and charged on the enumerated article which it most resembles in any of the particulars before mentioned. In determining the rate and amount of duties, the value of the merchandise is one factor; the question what schedule it properly falls under is another.

Congress has said that the valuation of the customs officers shall be final, but there is still a field left for the operation of the sections on which the plaintiffs in error rely. Questions relating to the classification of imports, and consequently to the rate and amount of duty, are open to review in an action at law. This construction gives effect to both provisions of the law. If we yield to the contention and construction of plaintiffs in error, we must strike from the statute the clause which renders the valuation of dutiable merchandise final.

We are of opinion, therefore, that the valuation made by the customs officers was not open to question in an action at law as long as the officers acted without fraud and within the power conferred on them by the statute. The evidence offered by the plaintiffs, and ruled out by the court, tended only to show carelessness or irregularity in the discharge of their duties by the customs officers, but not that they were assuming powers not conferred by the statute, and the questions which the plaintiffs proposed to submit to the jury were, in the view we take of the statute, immaterial and irrelevant. * * *

STANLEY v. ALBANY COUNTY SUP'RS.

(Supreme Court of United States, 1887. 121 U. S. 535, 7 Sup. Ct. 1234, 30 L. Ed. 1000.)

FIELD, J.[25] * * * In nearly all the states, probably in all of them, provision is made by law for the correction of errors and irregularities of assessors in the assessment of property for the purposes of taxation. This is generally through boards of revision or equalization, as they often are termed, with sometimes a right of appeal from their decision to the courts of law. They are established to carry into effect the general rule of equality and uniformity of taxation required by constitutional or statutory provisions. Absolute equality and uniformity are seldom, if ever, attainable. The diversity of human judgments, and the uncertainty attending all human evidence, preclude the possibility of this attainment. Intelligent men

[25] Only a portion of the opinion of Field, J., is printed.

differ as to the value of even the most common objects before them —of animals, houses, and lands in constant use. The most that can be expected from wise legislation is an approximation to this desirable end; and the requirement of equality and uniformity found in the Constitutions of some states is complied with when designed and manifest departures from the rule are avoided.

To these boards of revision, by whatever name they may be called, the citizen must apply for relief against excessive and irregular taxation, where the assessing officers had jurisdiction to assess the property. Their action is judicial in its character. They pass judgment on the value of the property upon personal examination and evidence respecting it. Their action being judicial, their judgments in cases within their jurisdiction are not open to collateral attack. If not corrected by some of the modes pointed out by statute, they are conclusive, whatever errors may have been committed in the assessment. As said in one of the cases cited, the money collected on such assessment cannot be recovered back in an action at law, any more than money collected on an erroneous judgment of a court of competent jurisdiction before it is reversed.

When the overvaluation of property has arisen from the adoption of a rule of appraisement which conflicts with a constitutional or statutory direction, and operates unequally not merely on a single individual, but on a large class of individuals or corporations, a party aggrieved may resort to a court of equity to restrain the exaction of the excess, upon payment or tender of what is admitted to be due. This was the course pursued and approved in Cummings v. National Bank, 101 U. S. 153, 25 L. Ed. 903. * * *

TAYLOR et al. v. LOUISVILLE & N. R. CO.

(Circuit Court of Appeals of United States, Sixth Circuit. 1898. 88 Fed. 350, 31 C. C. A. 537.)

Bill in equity against Taylor, Morgan, and Craig, who constitute the board of equalization of the state of Tennessee, to enjoin them from certifying in accordance with the act of the Legislature of Tennessee passed April 5, 1897, a tax valuation upon complainant's railroad in Tennessee, to be apportioned by the State Comptroller to the thirty-five counties, cities, and towns in which the road lies.

TAFT, Circuit Judge.[26] * * * The next objection to the assessment of the defendants, and the most serious, is that they have assessed the railroad property of the state, including that of complainant, at its real value, whereas all other property of the state is habitually and intentionally assessed by the assessing officers, who

[26] Only a portion of the opinion is printed.

are not the defendants, at not exceeding 75 per cent. of its real or correct value. We think it clear, from the provisions of the railroad assessment act of 1897, that neither board thereby created is charged with any duty to equalize the taxable value of real estate with that of railroad property. The board of equalization under the act of 1897 is made up of the same state officers who composed the state board of examiners under the prior act, and they were charged with the duty of revising the assessment of railroads made by the board of assessors and equalizers created by the act of 1895; but they had no revisory duty connected with that board's equalization of real estate throughout the state. Hence when, in 1897, the board of assessors and equalizers was abolished, the equalization of real estate values was abolished. The continuation of the state board of examiners under the new name of the "Board of Equalization" could have no effect to continue in force provisions of law as to state equalization of values of real estate, because that board never had any duty connected with the assessment of real estate at all. It is also clear that the act of 1897 commands the two boards created, by its terms, to fix the correct value of the railroad and other property which they assess. This means the real value of the property, and it is conceded that the laws for the assessment of real and personal property impose on the assessing officers the duty of assessing it at the same value.

The contention for the complainant is that the undervaluation of real and personal property is intentional and systematic throughout the state, and is in accordance with an immemorial and well-recognized custom; that, combined with the assessment at full value of all railroad property, the undervaluation of all other property makes a system of taxation operating to impose upon complainant, and all others holding the same class of property, a grossly unjust share of the cost of the state, county, and city governments; that this is in violation of the Constitution of the state of Tennessee, which enjoins uniformity of taxation, according to value, on all property, and expressly forbids that one species of property shall be taxed higher than any other; and that a court of equity, because it is unable to remedy the glaring injustice done to complainants and others of the same class, by compelling the assessment on other property to be raised to its real value, may accomplish the same result by enjoining the defendants from assessing railroad property at any higher percentage than that at which other property in the state is assessed, although this is a departure from the rule of action prescribed for them in the statute creating them a taxing board. In considering the soundness of this contention, we come first to the facts.

We find from the evidence, which is uncontradicted, that generally, in the state of Tennessee, for a number of years, the assessors and the board of equalization of each county have intended to assess, and have assessed, real and personal property at a uniform percentage

less than its real value; that this percentage is not uniform between the counties, but that it is not substantially less than 25 per cent. in any of them. We base our conclusion on 150 affidavits contained in the record. They do not cover specifically more than 35 counties out of the 96 counties in the state; but when they are supplemented by the evidence of the members of the state board of equalizers, who officially investigated the manner of making assessments in each county in the state by actual visits and by correspondence, by examining the assessing officers, and by a comparison of tax values with actual sales, we have no difficulty in finding the fact to be as above stated. The affidavits from different counties are many of them the sworn statements of the assessors and county equalizers themselves, who made the assessments, and leave not the slightest doubt that in each county the undervaluation was systematic, was according to a uniform and well-understood rule of reduction, and was for the purpose of reducing the proportionate burden of the expenses of the state government which the particular county would have to bear. These expenses are, in effect, apportioned to each county in the proportion which its total tax valuation bears to the total tax valuation of all the property in the state. The motive for undervaluation is manifest, and the variation in the percentage, as between the counties, is dependent only on the varying extremes to which taxing officers of different counties are willing to go in departing from the statutory rule to reduce the state burden on their respective counties. We further find that in the year 1897, which is one of the years in respect to which relief is asked in the bill, the assessment of real estate which was not affected by the repeal of the act of 1895 was equalized by the state board of assessors and equalizers, under that act, at a basis of 75 per cent. of its real value; that this was done intentionally, and was adopted as rule of action by that board. This is established by the evidence of two of the three members of the board, and of the secretary of the board; and although there is a discrepancy in their statements, as to whether the basis fixed was 70 or 75 per cent. (two of them saying that it was 70, and the other 75), the fact that they deliberately fixed a percentage of real value as their basis of assessment is admitted by all of them.

We are relieved from considering the weight of the evidence as to the exact basis by the averment of the bill, which fixes it at 75 per cent. The assessed value of real and personal property, except railroads and telegraph lines, in Tennessee, for the year 1897, was, in round numbers, $312,000,000. The value of railroads and telegraph lines, as assessed by defendants, was $63,000,000—an increase of the assessed value of the year before of $25,000,000. This makes a total tax value of $375,000,000, and imposes on the railroads $^{63}/_{375}$, or about $^{1}/_{6}$ of the entire burden of the state, county, and municipal governments. If the assessment of the real and personal property were increased to actual value, it would be $416,000,000, and the

share of the railroads in paying governmental expenses would be a little less than 1/8 of the whole. The existence of this glaring inequality no evidence has been introduced to contradict. The defendants have been content to deny it in a general way in their answer, and have adduced no testimony upon the point from any one professing to have specific knowledge on the subject.

The Constitution of Tennessee, adopted in 1870 (article 2, § 28) provides that: "All property—real, personal and mixed—shall be taxed. * * * All property shall be taxed according to its value, that value to be ascertained in such manner as the Legislature shall direct, so that taxes shall be equal and uniform throughout the state. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of the same value." * * *

There has been much discussion at the bar upon the point whether the Constitution of 1870 requires that all property shall be assessed at its full value, or whether it would satisfy the Constitution if the taxing laws required all property to be assessed for taxation at a uniform percentage—say 75 per cent. of its real value. Language has been quoted from the opinions of judges of the Supreme Court of Tennessee supporting the former view, but they were obiter, and wholly unnecessary to the decision of the cases before the court. Mayor, etc., of Chattanooga v. Nashville, C. & St. L. R. Co., 7 Lea, 569; Brown v. Greer, 3 Head, 696. Speaking for Judge LURTON and myself, we should be inclined to hold that any legislative system of tax assessment of property based on a uniform percentage of its value would be "according to its value," and would be a compliance with the constitutional mandate. This is, we think, in accordance with the latest expression from the Supreme Court of Tennessee in the Reelfoot Lake Levee District Case, already quoted [97 Tenn. 151, 36 S. W. 1041, 34 L. R. A. 725]. Judge SEVERENS doubts, and the difference is not material, for we are unanimously of opinion that the question is not controlling in this case. The Constitution expressly gives the Legislature the power to prescribe that all property shall be assessed at its true value, and the Legislature has done so. Such a legislative command is as binding on those whom it affects as if it were in the Constitution, because passed in pursuance of the fundamental law; and counsel for complainant do not avoid the difficulty which confronts them in the case, to wit, that they are seeking to enjoin defendants from doing that which the letter of the law requires the defendants to do, by showing that the requirement is in a constitutionally enacted statute, rather than in the Constitution itself.

The sole and manifest purpose of the Constitution was to secure uniformity and equality of burden upon all the property in the state. As a means of doing so (conceding that defendant's construction is the correct one), it provided that the assessment should be ac-

cording to its true value. It emphasized the object of the section by expressly providing that no species of property should be taxed higher than any other species. We have before us a case in which the complaining taxpayer, and other taxpayers owning the same species of property, are taxed at a higher rate than the owners of other species of property. This does not come about by legislative discrimination, but by the intentional and systematic disregard of the law by those charged with the duty of assessing all other species of property than that owned by complainant and its fellows of the same class. This is a flagrant violation of the clause of the Constitution forbidding discrimination in taxation between different species of property. That clause is self-executing. Reelfoot Lake Levee Dist. v. Dawson, 97 Tenn. 160, 36 S. W. 1043, 34 L. R. A. 725. How is it to be remedied? It is said on behalf of the defendants that the only method consistent with the Constitution is by raising the assessments of the real and personal property. This is no remedy at all. It has been suggested (but we cannot regard the suggestion as a serious one) that the railroad companies of the state should go before the taxing authorities of each county, and, after notifying each taxpayer, attempt to secure an increase in the total tax assessment of the real and personal property of the state from $312,000,000 to $416,000,000. The absolute futility of such a course, the enormous expense, and the length of time necessary in attempting to follow it, need no comment.

The question presented is, then, whether, when the sole object of an article of the Constitution is being flagrantly defeated, to the gross pecuniary injury of a class of litigants, and one of them appeals to a court of equity for relief, it must be withheld because the only mode of granting it will involve an apparent departure from the method marked out by the Constitution and the law for attaining its sole object. We say "apparent" departure from the constitutional method, because that instrument contemplated a system in which all property should be assessed at its real value. It did not intend that a large part should be assessed at 75 per cent., and a smaller part at 100 per cent. The method of assessing one species of property cannot be truly said to be constitutional, without having regard to that pursued with other species; for the essence of the constitutional requirement is uniformity, and uniformity cannot be affirmed to exist without a due regard to the methods of assessing all species. Therefore, to enjoin the enforcement of the prescribed method of assessment as to one species of property, when there is a departure from it as to all others, if the injunction secures uniformity as to all, is not so great a violation of the method really prescribed as that involved in a continuance of the existing conditions, and the denial of relief to the injured taxpayer. The court is placed in a dilemma, from which it can only escape by taking that path which, while it involves a nominal departure from the letter of the law, does

injury to no one, and secures that uniformity of tax burden which was the sole end of the Constitution. To hold otherwise is to make the restrictions of the Constitution instruments for defeating the very purpose they were intended to subserve. It is to stick in the bark, and to be blind to the substance of things. It is to sacrifice justice to its incident. The same dilemma has been presented to other courts. They have not always taken the same horn. There is a conflict of authority, but we are glad to say that the adjudications of that court whose decision we must follow support the views we have above expressed. Before examining the cases in the Supreme Court of the United States, let us refer to the decisions of some of the state courts upon the question:

In Randell v. City of Bridgeport, 63 Conn. 321, 28 Atl. 523, the case came into court on a direct appeal from the action of a board of equalization, called the "Board of Relief of the City of Bridgeport." The superior court found as a fact that it had been the uniform rule of the board of assessors and the board of relief of that city to value all property, for the purpose of taxation, at one-half of its fair market value. The court found that the plaintiff's property was assessed at its full market value as the statute required. The Supreme Court held that the complainant was entitled to an assessment of one-half the real value of his property, and this in the face of a mandatory provision of the statute that all property should be assessed at its true value. * * *

In Cocheco Co. v. Strafford, 51 N. H. 455, the law provided that the selectmen should appraise all taxable property at its full and true value in money. The statute further provided that the court should make such order thereon as justice required. Mr. Justice Doe, upon this point, in a concurring opinion, said: "Justice requires an equal rate of taxation of Strafford real estate. If the Strafford real estate of others was appraised in 1870 at a less rate than its full value, the real estate of the plaintiffs should be appraised by the commissioners at the same rate, so that the plaintiffs shall pay their proportion of tax and no more. The usual rate in farming towns is well understood, and the practice of undervaluation is so universal as to raise a presumption of fact that it prevails in Strafford. When the commissioners have ascertained the fact of the full value of the plaintiffs' Strafford real estate on the 1st day of April, 1870, they should proceed further, and appraise it at its value as compared with the value at which other Strafford real estate was appraised by the selectmen in 1870. This comparative value is the only question which the commissioners are appointed to decide, and is a pure question of fact."

This language was approved in Manchester Mills v. Manchester, 58 N. H. 38, on a petition for the abatement of the real estate tax, in which the court appointed a committee to find and report—First, the true value of the plaintiff's estate; and, second, the true

value of real estate of Manchester, other than plaintiff's compared with its assessed value. The question whether the second point was a proper subject for inquiry came before the court, and it was held that it was a proper subject of inquiry, and that the abatement should proceed on the findings made upon such inquiry.

[The opinion then cites, and quotes from, Ex parte Ft. Smith & Van Buren Bridge Co., 62 Ark. 461, 36 S. W. 1060. This part of the opinion is omitted.]

In the case of Board of Sup'rs of Bureau Co. v. Chicago, B. & Q. R. Co., 44 Ill. 229, the appeal was a direct appeal from the board of supervisors, which assessed the value of the property of the railroad company. It appeared that the valuation of property of individuals, except that of the railroad company ranged from one-fifth to one-third, while that of the railroad company ranged from one-third to one-half; and the appellate court decided that the assessment of the railroad property must be at the same percentage of the real value as that of individuals. The Constitution of Illinois required the general assembly to provide for levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his or her property; such value to be ascertained by some person or persons to be elected or appointed in such manner as the general assembly shall direct, and not otherwise. The act to carry out this section provided that each separate parcel should be valued at its true value in money. The court held that it was the duty of the supervisors to impose the same percentage of assessment upon the railroad company as had been assessed by the assessors upon the property of individuals.

[The opinion then cites and quotes from Chicago, B. & Q. R. Co. v. Board of Com'rs of Atchison Co., 54 Kan. 781, 39 Pac. 1039. This part of the opinion is omitted.]

As has already been said, there are cases in which the other horn of the dilemma has been taken, the injustice to the complaining class of taxpayers has been allowed to continue, and the violation of constitutional or statutory uniformity and equality has gone on unhindered, in order that the letter of the law may be preserved while its spirit is flagrantly broken. Wagoner v. Loomis, 37 Ohio St. 571; Central R. Co. v. State Board of Assessors, 48 N. J. Law, 1, 2 Atl. 789, 57 Am. Rep. 516. See, also, City of Lowell v. County Com'rs, 152 Mass. 372, 25 N. E. 469.

We are relieved from a further discussion of the question by the decision of the Supreme Court of the United States in the case of Cummings v. Bank, 101 U. S. 153, 25 L. Ed. 903. In that case the assessors of real property, the assessors of personal property, and the county auditor (who was the assessing officer of the first instance for bank shares) of the county where the complainant bank was situated agreed to assess real and personal property at one-third its value, and money or invested capital at six-tenths its value. This agreement

was in violation of the statutes under which they were acting, which required assessments to be at the true value in money. The state board of equalization for banks increased the assessment of complainant's bank shares to their full market value. The state board had no power to equalize bank shares with real or personal property, and, in assessing these bank shares at their full value, it was following the exact course prescribed by statute, and the statute was passed in accordance with the Constitution of Ohio, which requires the Legislature to pass laws taxing all property "by uniform rule at its true value in money." This action was brought by the complainant bank to enjoin the county treasurer from collecting the tax on the assessment against its shares which had been certified down by the state board of assessors. The Circuit Court of the United States enjoined the treasurer from collecting tax on a valuation greater than one-third of the real value of the shares. The effect of this order was to annul an assessment by the state board of equalization which was strictly in accordance with the letter of the statute governing it in the discharge of its duties, and which was equally in accord with the standard of value for assessment fixed by the Constitution of the state. The decree of the Circuit Court was affirmed by the Supreme Court on the principle stated by the court as follows: "When a rule or system of valuation is adopted, by those whose duty it is to make the assessment, which is designed to operate unequally, and to violate a fundamental principle of the Constitution, and when the rule is applied, not solely to one individual, but to a large class of individuals or corporations, [that] equity may properly interfere to restrain the operation of this unconstitutional exercise of power." * * *

The justice [Mr. Justice Miller] discussed the facts, to show that the laws had been unfaithfully administered by those charged with their execution, and that as the only method provided in the system by which constitutional uniformity was to be secured, namely, by taxing all property at its true value in money, though required by statute, had been departed from by the administrators of the law in assessing other classes of property than that held by the complainant, equity might relieve complainant from his unequal burden thus placed on him by enjoining taxation on more than one-third of the assessment against him, though his property had been only taxed at its true value. After commenting on the widespread custom or rule in many states to undervalue real estate, growing out of the effort of the landowner to produce something like equality of burden with personal property which escapes taxation by being hidden, the justice concluded: "But whatever may be its cause, when it is recognized as the source of manifest injustice to a large class of property, around which the Constitution of the state has thrown the protection of uniformity of taxation and equality of burden, the rule must be held void, and the injustice produced under it must be remedied, so far as the judicial power can give remedy."

The case before us cannot in any material respect be distinguished from the Cummings Case. In this case, as in that, the injunction sought is against the enforcement of an assessment upon complainant's property which was made at the true value of the property, in accordance with the mandate of the Constitution and statute, by assessing officers who had not themselves discriminated against complainant's property by undervaluing other species of property, and who were not themselves guilty of any fraud. In this case, as in that, the unjust operation of the assessment grows out of the systematic and intentional undervaluation of other species of property by assessors who are not responsible for the assessment complained of. In this case, as in that, the effect of the injunction is to compel certain assessors of the state to reduce their assessment to the illegal standard of valuation adopted by different and unfaithful assessors of other species of property, and is justified by the result that in this way is secured something like the uniformity which is the sole purpose of the Constitution. It has been pressed upon us that no such preconcert of action by the assessing officers, and no such uniform rule of undervaluation, have been shown in this case as appeared in the Cummings Case, and that upon these circumstances the Cummings Case turned. We have already found, from the evidence, that there is an intentional undervaluation of property in each county, and that this is uniform as to all real and personal property, and results from a clear understanding between the assessors and county boards of equalization, who have a common motive for the reduction. More than this, it is clearly shown that the state board of assessors and equalizers in 1896 intentionally equalized all real estate in the state at 75 per cent. of its true value for the taxation of the year 1897. Could preconcert be clearer than this?

It is further said that, before the remedy pursued in the Cummings Case can become applicable, it must appear that the undervaluation of one species of property was adopted as a rule of action by the assessors for the fraudulent purpose of discriminating against the complaining taxpayer and his class, and that no such case is presented to this court. Now, it is true that, before equity will relieve in such a case, it must appear that the assessing officers whose acts of undervaluation create the unjust burden must intentionally and habitually violate the law, by assessing property at a less valuation than that which they know to be its true value; but it is not true that they must be shown affirmatively to intend to injure complainant and his class of taxpayers in so doing. It is true that in the Cummings Case the unfaithful assessors, or some of them, did undervalue both real and personal property, and money capital, in which were included bank shares, at different percentages of their true value; but the assessment of which complaint was made was not the work of these assessors at all, but, as here, of a state board

of equalization. An intentional undervaluation of a large class of property, when the law enjoins assessment at true value, is necessarily designed to operate unequally upon other classes of property to be assessed by other taxing tribunals, who, it may be presumed, will conform to the law. In the case at bar the county assessors and board of equalization of each county have been actuated in their violations of the law by the desire to reduce, as far as may be, their county's share of the state burdens. Their undervaluations of property have been uniform as to all property in their county but railroads. They could not but know that such undervaluation must work an injustice against the property of railroads, if assessed at its true value by a state board, and taxed for county and state purposes on that basis. In this sense, the rule of undervaluations adopted in each county is necessarily "designed to operate unequally," within the meaning of Mr. Justice Miller in the Cummings Case. The ratio decidendi of that case is to be gathered from the facts, and the language of the opinion is to be interpreted in the view of the facts. The case has been commented on by the Supreme Court in a number of subsequent cases, but it has never been modified or overruled.

[The court then cites and quotes from Bank v. Kimball, 103 U. S. 732, 26 L. Ed. 469, Supervisors v. Stanley, 105 U. S. 305, 26 L. Ed. 1044, Stanley v. Supervisors, 121 U. S. 550, 7 Sup. Ct. 1234, 30 L. Ed. 1000, and Bank v. Perea, 147 U. S. 87, 13 Sup. Ct. 194, 37 L. Ed. 91.]

We find nothing in these cases which should change our view, already expressed, of the effect of the Cummings Case. They merely emphasize the point that equity will not relieve against an assessment merely because it happens to be at a higher rate than that of other property; that such inequalities, due to mistake, to the fallibility of human judgment, or to other accidental causes, must be borne, for the reason that absolute uniformity cannot be obtained; that, in other words, what may be called "sporadic cases of discrimination" cannot be remedied by the chancellor. He can only interfere when it is made clear that there is, with respect to certain species of property, systematic, intentional, and unlawful undervaluations for taxation by the taxing officers, which necessarily effect an unjust discrimination against the species of property of which the complainant is an owner. The reason for the distinction is obvious. The occasional and accidental discriminations are inevitable in every assessment, and are not likely to continue, because not the result of an illegal purpose on the part of any one. If equitable interference in such cases could be invoked, the obstruction to the collection of taxes would be so frequent as to be intolerable. More than this, an action to enjoin a tax is a collateral attack upon the judgment of a quasi judicial tribunal; and it cannot be justified except on the ground of an obvious violation of law, or something

equivalent to fraud. It does not lie where the injury complained of arises only from the erroneous, but honest, judgment of the lawfully constituted tax tribunal.

The interference by the chancellor in the case at bar and in the Cummings Case rests on something equivalent to fraud in the tribunal imposing the tax. The various boards whose united action is by law intended to effect a uniform assessment on all classes of property are to be regarded as one tribunal, and the whole assessment on all classes of property is to be regarded as one judgment. If any board which is an essential part of the taxing system intentionally, and therefore fraudulently, violates the law, by uniformly undervaluing certain classes of property, the assessment by other boards of other classes of property at the full value, though a literal compliance with the law, makes the whole assessment, considered as one judgment, a fraud upon the fully-assessed property. And this is true although the particular board assessing the complainant's property may have been wholly free from fault of fraud or intentional discrimination. Therefore the injunction might issue against the assessment upon the fully-assessed property, as void altogether, until a new and uniform assessment upon all property according to law could be made. And such is the rule in some courts. Weeks v. Milwaukee, 10 Wis. 263; Hersey v. Board, 16 Wis. 192, 82 Am. Dec. 713; Smith v. Smith, 19 Wis. 619, 88 Am. Dec. 707. The inequity of allowing the taxpayer to escape altogether, and the intolerable inconvenience to the public in the delay incident to such a course, however, lead a court of equity to shape its order so as to allow only so much of the fraudulent judgment to be enforced against the complainant as may be done without imposing on him any inequality of tax burden.

We reach the conclusion, therefore, that the Circuit Court was right in enjoining the unjust, unequal, and (in the sense already explained) fraudulent assessment against the complainant; but we think the order should have required, as a condition of the issuing of the injunction, that the complainant should pay to the proper officers a tax upon the 75 per cent. of the assessment made by defendants. The evidence, taken with the averments of the bill, does not establish that the discrimination against the complainant's property really exceeds this. The condition imposed by the Circuit Court was the payment of the taxes on the assessment for 1897 by the state board of assessors and equalizers. That assessment, as we have found, was annulled by the act of 1897.

The order of the court is that the order of injunction be modified as above stated, and that, as thus modified, it be affirmed, at the costs of the appellants.[27]

[27] Other cases in this collection illustrating the appeal to the courts for relief against administrative action in the matter of taxation and revenue: Action against officer: Stetson v. Kempton, 13 Mass. 272, 7 Am. Dec. 145 (1816); Easton v. Calendar, 11 Wend. (N. Y.) 90 (1833); Chegaray v. Jen-

SECTION 75.—RAILROAD RATE REGULATION

CHICAGO, M. & ST. P. RY. CO. v. STATE OF MINNESOTA ex rel. RAILROAD & WAREHOUSE COMMISSION.

(Supreme Court of United States, 1890. 134 U. S. 418, 10 Sup. Ct. 462, 33 L. Ed. 970.)

Writ of error to review a judgment of the Supreme Court of the state of Minnesota awarding a writ of mandamus against the Chicago, Milwaukee & St. Paul Railway Company.

BLATCHFORD, J.[28] The opinion of the Supreme Court is reported in 38 Minn. 281, 37 N. W. 782. In it the court, in the first place, construed the statute on the question as to whether the court itself had jurisdiction to entertain the proceeding, and held that it had. Of course, we cannot review this decision.

It next proceeded to consider the question as to the nature and extent of the powers granted to the commission by the statute in the matter of fixing the rates of charges. On that subject it said: "It seems to us that, if language means anything, it is perfectly evident that the expressed intention of the Legislature is that the rates recommended and published by the commission, assuming that they have proceeded in the manner pointed out by the act, should be not simply advisory, nor merely prima facie equal and reasonable, but final and conclusive as to what are lawful or equal and reasonable charges; that, in proceedings to compel compliance with the rates thus published, the law neither contemplates nor allows any issue to be made or inquiry had as to their equality and reasonableness in fact. Under the provisions of the act, the rates thus published are the only ones that are lawful, and therefore, in contemplation of law, the only ones that are equal and reasonable; and hence, in proceedings like the present, there is, as said before, no fact to

kins, 5 N. Y. 376 (1851); Tracy v. Swartwout, 10 Pet. 80, 9 L. Ed. 354 (1836); Elliott v. Swartwout, 10 Pet. 137, 9 L. Ed. 373 (1836); Cary v. Curtis, 3 How. 236, 11 L. Ed. 576 (1845); action against municipality: Lincoln v. Worcester, 8 Cush. (Mass.) 55 (1851); Falls v. Cairo, 58 Ill. 403 (1871); Ætna Insur. Co. v. Mayor, 153 N. Y. 331, 47 N. E. 593 (1897); Dooley v. United States, 182 U. S. 222, 21 Sup. Ct. 762, 45 L. Ed. 1074 (1901); certiorari: People v. Board of Assessors, 39 N. Y. 81 (1868); People ex rel. Del. & H. Canal Co. v. Parker, 117 N. Y. 86, 22 N. E. 752 (1889); Tomlinson v. Board of Equalization, 88 Tenn. 1, 12 S. W. 414, 6 L. R. A. 207 (1889); injunction: Cleveland, etc., R. Co. v. Backus, 154 U. S. 439, 14 Sup. Ct. 1122, 38 L. Ed. 1041 (1894); Pittsburgh, etc., R. Co. v. Board of Public Works, 172 U. S. 32, 19 Sup. Ct. 90, 43 L. Ed. 354 (1898); Huling v. Ehrich, 183 Ill. 315, 55 N. E. 636 (1899); defense against enforcement: Hagar v. Reclamation District, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569 (1884); appeal: Bureau County v. C., B. & Q. R. Co., 44 Ill. 229 (1867).

[28] Only a portion of the opinion of Blatchford, J., is printed.

traverse, except the violation of the law in refusing compliance with the recommendations of the commission. Indeed, the language of the act is so plain on that point that argument can add nothing to its force."

It then proceeded to examine the question of the validity of the act under the Constitution of Minnesota, as to whether the Legislature was authorized to confer upon the commission the powers given to the latter by the statute. It held that as the Legislature had the power itself to regulate charges by railroads, it could delegate to a commission the power of fixing such charges, and could make the judgment or determination of the commission as to what were reasonable charges final and conclusive. * * *

The construction put upon the statute by the Supreme Court of Minnesota must be accepted by this court, for the purposes of the present case, as conclusive, and not to be re-examined here as to its propriety or accuracy. The Supreme Court authoritatively declares that it is the expressed intention of the Legislature of Minnesota, by the statute, that the rates recommended and published by the commission, if it proceeds in the manner pointed out by the act, are not simply advisory, nor merely prima facie equal and reasonable, but final and conclusive as to what are equal and reasonable charges; that the law neither contemplates nor allows any issue to be made or inquiry to be had as to their equality or reasonableness in fact; that, under the statute, the rates published by the commission are the only ones that are lawful, and therefore, in contemplation of law, the only ones that are equal and reasonable; and that, in a proceeding for a mandamus under the statute, there is no fact to traverse except the violation of law in not complying with the recommendations of the commission. In other words, although the railroad company[29] is forbidden to establish rates that are not equal and reasonable, there is no power in the courts to stay the hands of the commission, if it choses to establish rates that are unequal and unreasonable.

This being the construction of the statute by which we are bound in considering the present case, we are of opinion that, so construed, it conflicts with the Constitution of United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions, or possessing the machinery of a court of justice.

[29] (Sic?) should be "commission."

Under section 8 of the statute, which the Supreme Court of Minnesota says is the only one which relates to the matter of the fixing by the commission of general schedules of rates, and which section, it says, fully and exclusively provides for that subject,[30] and is complete in itself, all that the commission is required to do is, on the filing with it by a railroad company of copies of its schedules of charges, to "find" that any part thereof is in any respect unequal or unreasonable, and then it is authorized and directed to compel the company to change the same, and adopt such charge as the commission "shall declare to be equal and reasonable"; and to that end it is required to inform the company in writing in what respect its charges are unequal and unreasonable. No hearing is provided for; no summons or notice to the company before the commission has found what it is to find, and declared what it is to declare; no opportunity provided for the company to introduce witnesses before the commission—in fact, nothing which has the semblance of due process of law; and although, in the present case, it appears that, prior to the decision of the commission, the company appeared before it by its agent, and the commission investigated the rates charged by the company for transporting milk, yet it does not appear what the character of the investigation was, or how the result was arrived at.

By the second section of the statute in question, it is provided that all charges made by a common carrier for the transportation of passengers or property shall be equal and reasonable. Under this provision, the carrier has a right to make equal and reasonable charges for such transportation. In the present case, the return alleged that the rate of charge fixed by the commission was not equal or reasonable, and the Supreme Court held that the statute deprived the company of the right to show that judicially. The question of the reasonableness of a rate of charge for transportation by a railroad company, involving, as it does, the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such depriva-

[30] Section 9 (f) of the act of Minnesota (Laws 1887, c. 10) provided: "Said commission may from time to time make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, includings forms of notices and service thereof, which shall conform as nearly as may be to those in use in the courts of this state. Any party may appear before said commission and be heard in person or by attorney."

The opinion delivered by the Supreme Court of Minnesota (State v. Chicago, M. & St. P. Ry. Co., 38 Minn. 281, 37 N. W. 782 [1888]) made no reference to this provision.

The Supreme Court of the United States, in San Diego Land & Town Co. v. National City, 174 U. S. 749, 19 Sup. Ct. 804, 43 L. Ed. 1154 (1899), said: "Observe that this court based its interpretation of the statute of Minnesota upon the construction given to it by the Supreme Court of that state."

tion takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law, and in violation of the Constitution of the United States; and, in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws.

It is provided by section 4 of article 10 of the Constitution of Minnesota of 1857, that "lands may be taken for public way, for the purpose of granting to any corporation the franchise of way for public use," and that "all corporations, being common carriers, enjoying the right of way in pursuance to the provisions of this section, shall be bound to carry the mineral, agricultural, and other productions and manufactures on equal and reasonable terms." It is thus perceived that the provision of section 2 of the statute in question is one enacted in conformity with the Constitution of Minnesota.

The issuing of the peremptory writ of mandamus in this case was, therefore, unlawful, because in violation of the Constitution of the United States; and it is necessary that the relief administered in favor of the plaintiff in error should be a reversal of the judgment of the Supreme Court awarding that writ, and an instruction for further proceedings by it not inconsistent with the opinion of this court.

In view of the opinion delivered by that court, it may be impossible for any further proceedings to be taken other than to dismiss the proceeding for a mandamus, if the court should adhere to its opinion that, under the statute, it cannot investigate judicially the reasonableness of the rates fixed by the commission. Still, the question will be open for review; and the judgment of this court is that the judgment of the Supreme Court of Minnesota, entered May 4, 1888, awarding a peremptory writ of mandamus in this case, be reversed, and the case be remanded to that court, with an instruction for further proceedings not inconsistent with the opinion of this court.

BRADLEY, GRAY, and LAMAR, JJ., dissent.[31]

INTERSTATE COMMERCE COMMISSION v. ALABAMA MIDLAND RY. CO.

(Supreme Court of the United States, 1897. 168 U. S. 144, 18 Sup. Ct. 45, 42 L. Ed. 414.)

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

On the 27th day of June, 1892, the Board of Trade of Troy, Ala., filed a complaint before the Interstate Commerce Commission, at Wash-

[31] See, also, Freund, Police Power, § 381.

ington, D. C., against the Alabama Midland Railway Company and the Georgia Central Railroad Company and their connections; claiming that, in the rates charged for transportation of property by the railroad companies mentioned, and their connecting lines, there is a discrimination against the town of Troy, in violation of the terms and provisions of the interstate commerce act of Congress of 1887 (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]).

The general ground of complaint is that, Troy being in active competition for business with Montgomery, the defendant lines of railway unjustly discriminate in their rates against the former, and give the latter an undue preference or advantage, in respect to certain commodities and classes of traffic. * * *

The commission, having heard this complaint on the evidence theretofore taken, ordered, on the 15th day of August, 1893, the roads participating in the traffic involved in this case "to cease and desist" from charging, demanding, collecting, or receiving any greater compensation in the aggregate for services rendered in such transportation than is specified as follows, to wit: [The specification is omitted.]

The defendants having failed to heed these orders, the commission thereupon filed this bill of complaint in the Circuit Court of the United States for the Middle District of Alabama, in equity, to compel obedience to the same. On the hearing in said court the bill of complaint was dismissed (69 Fed. 227), and complainant, the Interstate Commerce Commission, appealed the cause to the United States Circuit Court of Appeals for the Fifth Judicial Circuit, at New Orleans, La. And thereupon, in said last-named court, on the 2d day of June, 1896, the decree of the said Circuit Court of the United States for the Middle District of Alabama was in all things duly affirmed (21 C. C. A. 51, 74 Fed. 715), and from this judgment and decree the appellant has appealed to this court.

Mr. Justice SHIRAS, after stating the facts in the foregoing language, delivered the opinion of the court.[32] * * *

The first contention we encounter upon this branch of the case is that the Circuit Court had no jurisdiction to review the judgment of the commission upon this question of fact; that the court is only authorized to inquire whether or not the commission has misconstrued the statute, and thereby exceeded its power; that there is no general jurisdiction to take evidence upon the merits of the original controversy; and, especially, that questions under the third section are questions of fact, and not of power, and hence unreviewable.

We think this contention is sufficiently answered by simply referring to those portions of the act which provide that, when the court is invoked by the commission to enforce its lawful orders or requirements,

[32] Only a portion of this case is printed.

the court shall proceed, as a court of equity, to hear and determine the matter, and in such manner as to do justice in the premises.[33]

In the case of Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 16 Sup. Ct. 700, 40 L. Ed. 935, the findings of the commission were overruled by the Circuit Court, after additional evidence taken in the court, and the decision of the Circuit Court was reviewed in the light of the evidence, and reversed, by the Circuit Court of Appeals; and this court, in reference to the argument that the commission had not given due weight to the facts that tended to show that the circumstances and conditions were so dissimilar as to justify the rates charged, held that as the question was one of fact, peculiarly within the province of the commission, and as its conclusions had been accepted and approved by the Circuit Court of Appeals, and as this court found nothing in the record that made it our duty to draw a different conclusion, the decree of the Circuit Court of Appeals should be affirmed. Such a holding clearly implies that there was power in the courts below to consider and apply the evidence, and in this court to review their decisions.

So in the case of Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 16 Sup. Ct. 666, 40 L. Ed. 940, the decision of the Circuit Court of Appeals, which affirmed the validity of the order of the commission, upon the ground that, even if ocean competition should

[33] Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 384 [U. S. Comp. St. 1901, p. 3165]) § 16: "Whenever any common carrier, as defined in and subject to the provisions of this act, shall violate or refuse or neglect to obey any lawful order or requirement of the commission in this act named, it shall be the duty of the commission, and lawful for any company or person interested in such order or requirement, to apply, in a summary way, by petition, to the Circuit Court of the United States sitting in equity in the judicial district in which the common carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience, as the case may be; and the said court shall have power to hear and determine the matter, on such short notice to the common carrier complained of as the court shall deem reasonable; and such notice may be served on such common carrier, his or its officers, agents, or servants, in such manner as the court shall direct; and said court shall proceed to hear and determine the matter speedily as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises; and to this end such court shall have power, if it think fit, to direct and prosecute, in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition, and on such hearing the report of said commission shall be prima facie evidence of the matters therein stated; and if it be made to appear to such court, on such hearing or on report of any such person or persons, that the lawful order or requirement of said commission drawn in question has been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation or disobedience of such order or requirement of said commission, and enjoining obedience to the same."

This provision was changed by Act June 29, 1906, c. 3591, § 5, 34 Stat. 591 (U. S. Comp. St. Supp. 1909, p. 1161), as follows: "* * * If any carrier fails or neglects to obey any order of the commission, other than for the pay-

be regarded as creating a dissimilar condition, yet that in the case under consideration the disparity in rates was too great to be justified by that condition, was reversed by this court, not because the Circuit Court had no jurisdiction to consider the evidence, and thereupon to affirm the validity of the order of the commission, but because that issue was not actually before the court, and that no testimony had been adduced by either party on such an issue; and it was said that the language of the act, authorizing the court to hear and determine the matter as a case of equity, "necessarily implies that the court is not concluded by the findings or conclusions of the commission."

Accordingly our conclusion is that it was competent, in the present case, for the Circuit Court, in dealing with the issues raised by the petition of the commission and the answers thereto, and for the Circuit Court of Appeals on the appeal, to determine the case upon a consideration of the allegations of the parties, and of the evidence adduced in their support; giving effect, however, to the findings of fact in the report of the commission, as prima facie evidence of the matters therein stated.

It has been uniformly held by the several Circuit Courts and the Circuit Courts of Appeals, in such cases, that they are not restricted to the evidence adduced before the commission, nor to a consideration merely of the power of the commission to make the particular order

ment of money, while the same is in effect, any party injured thereby, or the commission in its own name, may apply to the Circuit Court * * * for an enforcement of such order. Such application shall be by petition, which shall * * * be served upon the carrier, * * * and the court shall prosecute such inquiries and make such investigations, through such means as it shall deem needful in the ascertainment of the facts at issue, or which may arise upon the hearing of such petition. If upon such hearing as the court may determine to be necessary, it appears that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction, or other proper process, mandatory or otherwise, * * * and in the enforcement of such process the court shall have those powers ordinarily exercised by it in compelling obedience to it by writs of injunction and mandamus. From any action upon such petition an appeal shall lie by either party to the Supreme Court of the United States, and in such court the case shall have priority in hearing and determination over all other causes except criminal causes, but such appeal shall not vacate or suspend the order appealed from. The venue of suits brought in any of the Circuit Courts of the United States against the commission to enjoin, set aside, annul or suspend any order or requirement of the commission shall be in the district where the carrier * * * has its principal operating office and may be brought at any time after such order is promulgated. * * * No injunction, interlocutory order or decree suspending or restraining the enforcement of an order of the commission shall be granted except on hearing after not less than five days' notice to the commission. An appeal may be taken from any interlocutory order or decree granting or continuing an injunction in any suit, but shall lie only to the Supreme Court of the United States."

See, also, the provision from the act of 1906 set forth in the passage next quoted.

"In consequence of one of the comprehensive amendments to the act to regulate commerce, adopted in 1906 (Act June 29, 1906, c. 3591, § 4, 34 Stat. 589 [U. S. Comp. St. Supp. 1909, p. 1158]), it is now provided that 'all orders

under question, but that additional evidence may be put in by either party, and that the duty of the court is to decide, as a court of equity, upon the entire body of evidence.

Coming at last to the questions of fact in this case, we encounter a large amount of conflicting evidence. It seems undeniable, as the effect of the evidence on both sides, that an actual dissimilarity of circumstances and conditions exists between the cities concerned, both as respects the volume of their respective trade, and the competition, affecting rates, occasioned by rival routes by land and water. Indeed, the commission itself recognized such a state of facts, by making an allowance in the rates prescribed for dissimilarity resulting from competition; and it was contended on behalf of the commission, both in the courts below and in this court, that the competition did not justify the discriminations against Troy to the extent shown, and that the allowance made therefor by the commission was a due allowance.

The issue is thus restricted to the question of the preponderance of the evidence on the respective sides of the controversy. We have read the evidence disclosed by the record, and have endeavored to weigh it with the aid of able and elaborate discussions by the respective counsel.

No useful purpose would be served by an attempt to formally state and analyze the evidence, but the result is that we are not convinced that the courts below erred in their estimate of the evidence, and that

of the commission, except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the commission, unless the same shall be suspended or modified or set aside by the commission, or be suspended or set aside by a court of competent jurisdiction.' The statute endowing the commission with large administrative functions, and generally giving effect to its orders concerning complaints before it without exacting that they be previously submitted to judicial authority for sanction, it becomes necessary to determine the extent of the powers which courts may exert on the subject. Beyond controversy, in determining whether an order of the commission shall be suspended or set aside, we must consider (a) all relevant questions of constitutional power or right; (b) all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and (c) a proposition which we state independently, although in its essence it may be contained in the previous one, viz., whether, even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. Postal Teleg. Cable Co. v. Adams, 155 U. S. 688, 698, 15 Sup. Ct. 268, 360, 39 L. Ed. 311, 316, 5 Interst. Com. Rep. 1. Plain as it is that the powers just stated are of the essence of judicial authority, and which, therefore, may not be curtailed, and whose discharge may not be by us in a proper case avoided, it is equally plain that such perennial powers lend no support whatever to the proposition that we may, under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful administrative order upon our conception as to whether the administrative power has been wisely exercised." Interstate Commerce Commission v. Illinois Cent. R. Co., 215 U. S. 452, 469, 470, 30 Sup. Ct. 155, 160, 54 L. Ed. —— (1909).

we perceive no error in the principles of law on which they proceeded in the application of the evidence.

The decree of the Circuit Court of Appeals is accordingly affirmed.

Mr. Justice HARLAN, dissenting.

SECTION 76.—CORPORATIONS

KANSAS HOME INS. CO. v. WILDER.

(Supreme Court of Kansas, 1890. 43 Kan. 731, 23 Pac. 1061.)

JOHNSTON, J.[34] Two cases between the same parties are submitted together upon a single statement of facts, and according to the stipulation of the parties only two legal propositions are presented for decision. The first one of these is whether the courts can inquire into and control the superintendent of insurance in the exercise of his official duties in granting, refusing, or revoking a certificate of authority to a mutual fire insurance company organized under chapter 132 of the Laws of 1885. Prior to the legislative session of 1889, the finding and judgment of the superintendent in respect to the solvency of an insurance company, and its compliance with the requirements of law, could not be controlled, and when he had exercised his discretion and judgment it could not be reviewed, nor the motives which actuated him inquired into by the courts. Insurance Co. v. Wilder, 40 Kan. 561, 20 Pac. 265.

The decision in the cited case, construing the statute with reference to the power and discretion of the superintendent, was given in January, 1889, and the Legislature, which convened in the same month, materially modified the statute, prescribing the power and duties of the superintendent in dealing with mutual fire insurance companies. In section 24, c. 132, Laws 1885, provision was made that, whenever it should appear to the superintendent of insurance that the solvency of a mutual fire insurance company was impaired, or that the insurance laws of the state were being violated, he should immediately make an examination, and for that purpose should have access to all the books and papers of the company, and have power to administer oaths and examine witnesses. It then proceeds: "If *the superintendent of insurance shall find,* upon such examination, that the solvency of the company has been impaired, or that the laws of the state have been violated, he shall immediately suspend the certificate of authority until the laws of the state have been fully complied with, or the solvency of the company restored; or, if in his judgment the public safety require

[34] Only a portion of the opinion of Johnston, J., is printed.

it, he may revoke the certificate of authority, and cause the company to be enjoined from further insuring of property."

This section was amended by chapter 159 of the Laws of 1889, [by] which, after providing for reports and examinations substantially as in the original section, the provision above quoted is changed so as to read as follows: "If the solvency of such company has been impaired, or the laws of the state have been violated, by the company, the superintendent of insurance shall immediately suspend the certificate of authority until the laws of the state have been fully complied with, or the solvency of the company restored; and he also may in such a case revoke the certificate of authority, and cause the company, upon proper proceedings instituted against it, to be enjoined from further insuring of property." Provisos are then added which, in substance, state that the superintendent cannot refuse an insurance company a certificate of authority to do business in the state, or revoke or suspend a certificate already granted to such a company, if it is solvent, and has complied and is complying with the laws of the state. And the provisos further recognize that actions may be brought against the superintendent of insurance in the county where his office is located, to compel him to issue certificates of authority to an insurance company, and to restrain him from revoking or suspending a certificate of authority which had been theretofore granted.

The language in the statute of 1885 which we have italicized was omitted in the amendment of 1889. In the earlier provision, the license or certificate of authority might be suspended on the mere finding of the superintendent that the solvency of the company had been impaired, and it might be revoked solely upon his judgment that the public safety required it. The language authorizing the suspension or revocation of a certificate of authority upon the mere finding and discretion of the superintendent is carefully excluded from the later provision. These changes, together with the provisions forbidding the refusal, revocation, or suspension of a certificate of authority by the superintendent, where the company is solvent, and has complied with all the laws of the state, as well as the proviso which recognizes that an action of mandamus may be brought to compel the superintendent to issue certificates of authority, and an action of injunction may be brought against him to enjoin him from revoking or suspending certificates of authority, indicate quite clearly the legislative purpose that, in the future, the determination and action of the superintendent should not be final and conclusive, so far as mutual fire insurance companies are concerned.

The fact that the law was amended so soon after a judicial construction had been placed upon it is not to be overlooked in ascertaining the object of the Legislature in enacting the amended law. By changing the language of the statute, the Legislature has indicated a purpose to change the rule of the former statute, and that the new is to have a different construction than had already been placed upon the old one.

This circumstance, and the changes in the phraseology that were made, manifest a legislative purpose to make the determination of the superintendent, as to the right of a mutual fire insurance company to begin or continue business, subject to judicial inquiry and control. If this was not the effect, then the amendment was for no purpose; and it is contended here that no actual change was made or intended by the amendment. But we cannot presume that the "Legislature intended to go through the form and time and expense of legislation to accomplish nothing, or to do that already fully and completely done." City of Emporia v. Norton, 16 Kan. 236. The first question presented must therefore be decided in the affirmative. * * *

PROVIDENT SAVING LIFE ASSUR. SOCIETY v. CUTTING, Insurance Com'r.

(Supreme Judicial Court of Massachusetts, 1902. 181 Mass. 261, 63 N. E. 433, 92 Am. St. Rep. 415.)

Case reserved from Supreme Judicial Court, Suffolk county.

Petition for mandamus by the Provident Savings Life Assurance Society of New York against Frederick L. Cutting, Insurance Commissioner of the Commonwealth. Case reserved for the determination of the full court on the petition, demurrer, and agreed statement of facts. Petition dismissed.

KNOWLTON, J. This is a petition for a writ of mandamus to compel the insurance commissioner to change his valuation of the outstanding policies of the petitioner so as to diminish the reserve liability for which it must have assets to meet the requirements of our law. The duty of the commissioner to make this valuation under Rev. Laws, c. 118, § 11, is only a preliminary part of his duty, under section 17 of this chapter, annually to "make a report to the general court of his official transactions," in which he shall include, among other things, "an exhibit of the financial condition and business transactions of the several insurance companies as disclosed by official examinations of the same, or by their annual statements, abstracts of which statements, with his valuation of life policies, shall appear therein, and such other information and comments relative to insurance and to the public interest therein, as he thinks proper." It is important in one other way. It naturally is used in part as a foundation for action in case he is called upon, under section 7, to revoke or suspend the certificates and authority granted to a foreign insurance company because he is of opinion that it is "in an unsound condition," or "that its actual funds, exclusive of its capital, are less than its liabilities."

The complaint against the respondent is that in applying the rule of computation prescribed by the statute to a certain class of policies issued by the petitioner, he has made a mistake in holding that, for the

purpose of ascertaining their reserve value, they are to be treated as being from their inception policies for life or for an endowment period, and not as policies for one year only, with an option in the assured to continue them in force at the end of the year without a further physical examination, and without an increase of premium on account of his greater age. It is not contended that he has acted in bad faith, or has willfully disobeyed the law. There is only a difference of opinion between the petitioner and the respondent as to the proper application of the rule prescribed by the statute to the methods of the petitioner in insuring under this class of policies.

A preliminary question is whether the decision of the commissioner in a matter of this kind is subject to revision by this court on an application for a writ of mandamus. In various proceedings affecting foreign insurance companies the statute makes no provision for an appeal from his decision, but manifestly intends that his conclusion, in the exercise of his judgment, shall be final. Particularly is this so in the valuation of policies and assets and the determination of the financial condition of foreign companies doing business in this commonwealth. "Before granting certificates of authority to an insurance company to issue policies or make contracts of insurance, the commissioner shall be satisfied by such examination as he may make and such evidence as he may require, that such company is otherwise qualified under the laws of this commonwealth to transact business herein." Rev. Laws, c. 118, § 6. By Rev. Laws, c. 120, § 10, he has absolute authority to give or withhold his indorsement upon a requisition of the directors for the withdrawal of any portion of an emergency fund deposited by an assessment insurance company with the treasurer of the commonwealth. Under Rev. Laws, c. 120, § 12, the authority granted to a foreign assessment insurance company to do business in this commonwealth "shall be revoked if the insurance commissioner, on investigation, is satisfied that such corporation is not paying in full the maximum amount named in its policies, or that it has otherwise failed to comply with any provision of this chapter or its own contracts."

In regard to the reduction of capital stock of an insurance company it is provided by Rev. Laws, c. 118, § 37, that, "if the commissioner finds that the reduction is made in conformity to law, and that it will not be prejudicial to the public, he shall endorse his approval upon the certificate." By section 67 of this chapter a company organized under the laws of another state may be admitted to do business in this commonwealth, "if in the opinion of the commissioner, it is in sound financial condition," etc. Section 72 provides that "no domestic life insurance company shall reinsure its risks except by permission of the insurance commissioner; but may reinsure not exceeding one-half of any individual risk." Under section 78 "no foreign insurance company shall be so admitted and authorized to do business until * * * it has satisfied the insurance commissioner" of numerous facts therein stated. The terms of each of these sections make

it plain that the opinion and judgment of the insurance commissioner is to be final and conclusive in determining these important matters upon which the rights of the insurance companies and the protection of the public depend. Most, if not all, of these several conclusions involve the consideration of questions of law as well as questions of fact.

In regard to the only important results depending upon the valuation of policies to ascertain the reserve liability of insurance companies, namely, the making of a report to the Legislature, and the revocation or suspension of certificates of authority to do business, it seems that the judgment of the commissioner is not subject to revision. Under section 17 he is to make a report of the financial condition of insurance companies and of their transactions and the valuation of life policies, which must mean a report, according to his understanding of the facts, founded on examinations and statements. By section 7 he is to revoke or suspend certificates of authority granted to a foreign insurance company if he "is of opinion, upon examination or other evidence, that a foreign insurance company is in an unsound condition, that it has failed to comply with the law, or that its actual funds, exclusive of its capital, if it is a life insurance company, are less than its liabilities," etc., and no new business can thereafter be done by such company "until its authority to do business is restored by the commissioner." If the "ground for revocation or suspension relates only to the financial condition or soundness of the company, or to a deficiency in its assets," there is no appeal from a decision of the commissioner. In other cases the company may apply to the Supreme Judicial Court for a reversal of his decision. Here again is an indication that the judgment of the commissioner in all matters of law or fact involved in determining the financial condition of a company for a purpose affecting it, even to the extent of terminating its existence as an insurer in this commonwealth, is to be final and conclusive.

The valuation of policies for the purpose of determining the reserve liability is only one of the processes necessary to determine the company's financial condition. It involves an application of the statutory rule to each policy, in connection with the methods and practices in the transaction of the business that exist either as a part of the science of life insurance or otherwise outside of the stipulations of the policy. New forms of policies may be adopted which were not known when the statutory rule was established, and new questions may arise depending in part upon the principles of life insurance as a science and in part upon the practices of the company, as well as upon rules of law, in determining how the statutory rule shall apply to these policies. In the present case, even if the contracts referred to are to be considered technically as the petitioner contends, the statute is silent as to whether the value of the option to continue the insurance at the end of the year without an examination, and at the premium fixed for an age a year younger than the assured would then have attained, is not to

be considered in determining the reserve liability of the company under the contract.

Questions of fact and questions of law must be considered in coming to a conclusion. In valuing all the assets of a company, which usually comprise investments of many kinds, questions of law as well as questions of fact must inevitably arise. If we are to examine each policy or class of policies, together with the methods of the company in fixing their premiums, and any other facts pertaining to the policies which are different from those belonging to other kinds of policies, for the purpose of determining whether the insurance commissioner has made a mistake of law in valuing them, we know of no good reason why his valuation of each item of the assets might not be examined to see if it is affected by a mistake of law. A mistake of the latter kind might be as detrimental to the company as one of the former, whether viewed in reference to its effect upon the commissioner's report or upon his determination to revoke or suspend the certificate of authority. If the commissioner's mistakes of law are to be corrected on an application for a writ of mandamus, his mistakes in the construction of contracts entering into investments should be dealt with as well as his mistakes in the construction of contracts for insurance.

We are of opinion that the statute does not contemplate a revision of the commissioner's decisions in this way. This officer is intrusted with the performance of important duties, and invested with power to use his discretion and judgment in matters which call for prompt and decisive action, and which would be difficult to investigate in our courts. We are of opinion that, at least so long as he acts in good faith, intending to obey the law, we cannot, by a writ of mandamus, compel him to change his conclusions, either of law or fact, in the valuation of the policies or assets of a life insurance company.

Without considering whether any mistake appears, we must deny the petitioner's application. Similar decisions have been made in regard to the powers of the insurance commissioner in Ohio and Kansas. State v. Moore, 42 Ohio St. 103; Insurance Co. v. Wilder, 40 Kan. 561, 20 Pac. 265.

Petition dismissed.

UNITED STATES FIDELITY & GUARANTY CO. v. LINEHAN, Insurance Com'r.

(Supreme Court of New Hampshire, 1904. 73 N. H. 41, 58 Atl. 956.)

Mandamus by the United States Fidelity & Guaranty Company against John C. Linehan, insurance commissioner. Writ granted.

The plaintiff is incorporated under the laws of Maryland, and under authority of its charter is engaged outside of New Hampshire in the business of a fidelity and surety company and in the burglary insurance

business. It was licensed to do business as a fidelity and surety company in this state on February 17, 1897, since which date its license has been renewed continuously, except for a short time after May 29, 1900. On July 16, 1900, and on other dates since then, the plaintiff requested the defendant to issue to it a license to do a burglary insurance business in New Hampshire, in addition to the license to do fidelity and guaranty business, and the defendant refused to do so. It has complied with all the provisions of the statutes which are prerequisite to the issuance of the license prayed for, if it is entitled thereto.

The defendant, acting in good faith in his capacity as insurance commissioner, refused to issue a license to the plaintiff company. While he believed that, as a general rule, speaking not of to-day, but of the future, no company that does a surety business in combination with any other business is a safe and reliable company, he was satisfied that the plaintiff was a safe, reliable company, entitled to public confidence at present, and should consider it as such if permitted to do burglary insurance business in New Hampshire. He also believed that it would be contrary to public policy to permit such a combination of surety and other insurance business in this state. This belief was based upon the length of time that must necessarily elapse before the ultimate liability on surety bonds can be ascertained, and upon the lack of statistics from which to compute the proper relation between reserve fund and liability. But he believed this company would be able to do its entire business with perfect safety if permitted to do burglary insurance business in New Hampshire in addition to its other lines, and would continue so, unless the company added more hazardous lines than the one now proposed; but he objected to licensing this company because he believed that it was against public policy, for the reason that the combination of surety business with other insurance business was unsafe as a general proposition.

WALKER, J. The plaintiff is a Maryland corporation, and under its charter it is authorized to carry on in combination the business of a surety company and that of a burglary insurance company. Both classes of business properly fall under the general designation of insurance. The plaintiff is an insurance company, empowered by its charter to do a dual insurance business. But its charter does not confer upon it power to engage in business in New Hampshire. Such power, if it exists, is derived from the expressed or implied will of the Legislature of this state. It is a privilege or license which the Legislature may withhold from corporations like the plaintiff, organized in other states (Pembina Mining Co. v. Pennsylvania, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. Ed. 650); but, in the absence of express legislation against the exercise of the privilege by such corporations, it is generally held that they acquire the right by comity, or that legislative silence upon the subject is equivalent to permission (2 Mor. Corp., §§ 960, 961; Cowell v. Springs Co., 100 U. S. 55, 59, 25 L. Ed. 547). A state policy may be as thoroughly established in this way as by posi-

tive enactment. If the Legislature does not see fit to prohibit a foreign corporation from carrying its business here, when it is not repugnant to common-law principles, it, in effect, declares the public policy of the state to be favorable to its engaging in business here. The presumption of legislative intention, founded upon the doctrine of comity, affords ample evidence in support of that conclusion.

It is not claimed that there is any legislation in this state which prohibits an insurance company of another state from carrying on here the business of a surety company or that of a burglary insurance company. In accordance, therefore, with the principle above noted, it follows that it is the policy of the state to permit companies to engage here in those lines of insurance, restricted only by their charter provisions and such regulations or conditions as the Legislature has enacted relating to the business of insurance. By comity they are invested with a qualified right to do business here, of which they cannot be deprived except by legislative prohibition. These principles have received legislative sanction in statutes regulating the business of foreign insurance companies and surety companies. Pub. St. 1901, cc. 169, 172.

Nor has the Legislature furnished evidence of a policy to exclude insurance companies from the state which combine two or more distinct classes of insurance business. In United States, etc., Co. v. Linehan, 70 N. H. 395, 47 Atl. 611, it was held that a foreign surety company may be licensed to transact that business in this state, although authorized by its charter to engage in other business. The Legislature had not made the fact that it was authorized by its charter to do several kinds of insurance business conclusive evidence against its right, by comity, to do one kind. In Employers' Assurance Corp. v. Merrill, 155 Mass. 404, 405, 29 N. E. 529, it is said: "Before the year 1879, foreign companies, authorized by their charters to transact more than one class of insurance, and admitted here, were not restricted in their operations by our statutes; but since the passage of the statute of 1879 (page 484, c. 130), such companies, with exceptions not material to the present case, have been required to elect one class or kind of business, and allowed to transact here only that class or kind." And the court further say (page 410, 155 Mass., page 531, 29 N. E.), that originally "foreign companies, under certain conditions not restricting the classes of risks which they might write, were allowed to transact business here. A license or certificate of authority from the insurance commissioner was first provided for by the statute of 1878 (page 93, c. 130, § 6), and the foreign company to whom it was issued was thereupon 'authorized to transact business in this commonwealth,' and was restricted only by its charter."

A similar result was reached in People v. Company, 153 Ill. 25, 38 N. E. 752, 26 L. R. A. 295, where it was held that, in the absence of any prohibition in the statute against the business of multiform insur-

ance, the comity that prevails between the states permits a foreign corporation to do such insurance in Illinois, although the statute of that state does not authorize the formation of companies for that purpose. See, also, State v. Insurance Co., 39 Minn. 538, 41 N. W. 108. By comity the plaintiff acquired the right to carry on its dual business in this state, subject to the statutory regulations imposed upon foreign insurance companies; and its right in this respect, until revoked by the Legislature, is as secure and stable as though it had been acquired by express grant from that body.

As the Legislature has, in effect, authorized foreign insurance corporations carrying on more than one line of insurance to exercise their charter powers in this state, subject to certain statutory regulations, it is clear that they cannot be excluded by the commissioner simply upon the ground that he believes that such combinations, as a general rule, are opposed to the public interest. If such a company has complied with the prescribed regulations, and "the commissioner is satisfied that the company has the requisite capital and assets, and that it is a safe, reliable company, entitled to confidence, he shall grant a license to it to do insurance business by authorized agents within the state, subject to the laws of the state, until the first day of April thereafter." Pub. St. 1901, c. 169, § 6. If, upon examination, he finds that the company has complied with the requirements of the statute, and he is satisfied that it has the requisite capital and assets, and "that it is a safe, reliable company, entitled to confidence," it is his duty to grant the license. The finding of these facts in favor of the company renders his opinion as to the general nature of the insurance business it is authorized by its charter to do immaterial. The duty imposed upon him is to carry out the purpose of the Legislature, judicially ascertained, and that purpose does not authorize him officially to pass upon the general question of the utility of permitting foreign insurance companies to do business in this state.

The nature of the applicant's business is undoubtedly to be considered by the commissioner as evidence upon the question of its reliability as a business corporation, and it is conceivable that that alone might warrant his finding of the fact of its unreliability. Also, the difficulty of computing the ratio between its reserve fund and its liabilities is an evidentiary fact bearing upon the question of its financial soundness. But when, upon the evidence before him, he is satisfied, as he was in this case, that the company "was a safe, reliable company, entitled to public confidence at present," that "its methods of business were safe and conservative," and that it "would be able to do its entire business with perfect safety if permitted to do burglary insurance business in New Hampshire in addition to its other lines, and would continue so unless the company added more hazardous lines than the one now proposed," he cannot exclude it on the ground that it is theoretically unreliable. If by reason of the dual character of its business he was unable to determine the question of its relia-

bility, or if he was satisfied that such a business combination rendered this company unsafe in fact for public patronage, his refusal to grant it a license would seem to have been amply justified.

The evidence which satisfies him that the company is entitled to public confidence shows that his theory that such companies are not safe and reliable is not of universal application, and ought not to be invariably followed. The character of its business does not afford conclusive proof that it is unsafe. It may be safe in the statutory sense, notwithstanding it does a dual business; and the commissioner's finding that it is safe and reliable, as a matter of fact, renders the objection that it is theoretically unsafe of little practical consequence. However it may be with other similar companies, the commissioner finds that this company possesses all the statutory requirements for carrying on its business in this state, comity favors its admission, and hence it is entitled to the license sought as a matter of legal right. It only remains for the commissioner to perform the ministerial duty of issuing the license, and that duty may be appropriately enforced in this proceeding. Boody v. Watson, 64 N. H. 162, 9 Atl. 794; Hart v. Folsom, 70 N. H. 213, 217, 47 Atl. 603; Manchester v. Furnald, 71 N. H. 153, 158, 51 Atl. 657.

Petition granted. All concurred.

SECTION 77.—IMMIGRATION—QUESTION OF CONDITION OF ALIEN

NISHIMURA EKIU v. UNITED STATES et al.

(Supreme Court of United States, 1892. 142 U. S. 651, 12 Sup. Ct. 336, 35 L. Ed. 1146.)

Appeal from the Circuit Court of the United States for the Northern District of California. Affirmed.

Habeas corpus, sued out May 13, 1891, by a female subject of the emperor of Japan, restrained of her liberty and detained at San Francisco upon the ground that she should not be permitted to land in the United States.

The petitioner arrived at the port of San Francisco on the steamship Belgic, from Yokohama, Japan, on May 7, 1891. William H. Thornley, commissioner of immigration of the state of California, and claiming to act under instructions from and contract with the Secretary of the Treasury of the United States, refused to allow her to land; and the collector wrote to Thornley, approving his action.

Thereafter, on May 13, 1891, this writ of habeas corpus was issued to Thornley, and he made the following return thereon: "In obedience to the within writ I hereby produce the body of Nishimura Ekiu, as within directed, and return that I hold her in my custody by direction of the customs authorities of the port of San Francisco, Cal., under the provisions of the immigration act; that, by an understanding between the United States attorney and the attorney for petitioner, said party will remain in the custody of the Methodist Episcopal Japanese and Chinese Mission pending a final disposition of the writ." The petitioner remained at the mission house until the final order of the Circuit Court.

Afterwards, and before a hearing, the following proceedings took place: On May 16th the district attorney of the United States intervened in opposition to the writ of habeas corpus, insisting that the finding and decision of Thornley and the collector were final and conclusive, and could not be reviewed by the court. John L. Hatch, having been appointed on May 14th, by the Secretary of the Treasury, inspector of immigration at the port of San Francisco, on May 16th made the inspection and examination required by the act of March 3, 1891, c. 551, 26 Stat. 1084 (U. S. Comp. St. 1901, p. 1294), entitled "An act in amendment to the various acts relative to immigration and the importation of aliens under contract or agreement to perform labor," and refused to allow the petitioner to land, and made a report to the collector in the very words of Thornley's report, except in stating the date of the act of Congress, under which he acted, as March 3, 1891, instead of August 3, 1882; and, on May 18th, Hatch intervened in opposition to the writ of habeas corpus, stating these doings of his, and that upon said examination he found the petitioner to be "an alien immigrant from Yokohama, empire of Japan," and "a person without means of support, without relatives or friends in the United States," and "a person unable to care for herself, and liable to become a public charge, and therefore inhibited from landing under the provisions of said act of 1891, and previous acts of which said act is amendatory," and insisting that his finding and decision were reviewable by the superintendent of immigration and the Secretary of the Treasury only.

At the hearing before the commissioner of the Circuit Court, the petitioner offered to introduce evidence as to her right to land; and contended that the act of 1891, if construed as vesting in the officers named therein exclusive authority to determine that right, was in so far unconstitutional, as depriving her of her liberty without due process of law; and that by the Constitution she had a right to the writ of habeas corpus, which carried with it the right to a determination by the court as to the legality of her detention, and therefore, necessarily, the right to inquire into the facts relating thereto.

The commissioner excluded the evidence offered as to the petitioner's right to land, and reported that the question of that right

had been tried and determined by a duly constituted and competent tribunal having jurisdiction in the premises; that the decision of Hatch, as inspector of immigration, was conclusive on the right of the petitioner to land, and could not be reviewed by the court, but only by the commissioner of immigration and the Secretary of the Treasury; and that the petitioner was not unlawfully restrained of her liberty.

On July 24, 1891, the Circuit Court confirmed its commissioner's report, and ordered "that she be remanded by the marshal to the custody from which she has been taken, to wit, to the custody of J. L. Hatch, immigration inspector for the port of San Francisco, to be dealt with as he may find that the law requires, upon either the present testimony before him, or that and such other as he may deem proper to take." The petitioner appealed to this court.

Mr. Justice GRAY, after stating the case, delivered the opinion of the court.[35]

As this case involves the constitutionality of a law of the United States, it is within the appellate jurisdiction of this court, notwithstanding the appeal was taken since the act establishing Circuit Courts of Appeals took effect. Act March 3, 1891, c. 517, § 5, 26 Stat. 827, 828, 1115 (U. S. Comp. St. 1901, p. 549).

It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. Vat. Law Nat. lib. 2, §§ 94, 100; 1 Phillim. Int. Law (3d Ed.) c. 10, § 220. In the United States this power is vested in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war. It belongs to the political department of the government, and may be exercised either through treaties made by the President and Senate, or through statutes enacted by Congress, upon whom the Constitution has conferred power to regulate commerce with foreign nations, including the entrance of ships, the importation of goods, and the bringing of persons into the ports of the United States; to establish a uniform rule of naturalization; to declare war, and to provide and maintain armies and navies; and to make all laws which may be necessary and proper for carrying into effect these powers and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof. Const. art. 1, § 8; Head-Money Cases, 112 U. S. 580, 5 Sup. Ct. 247, 28 L. Ed. 798; Chae Chan Ping v. U. S., 130 U. S. 581, 604–609, 9 Sup. Ct. 623, 32 L. Ed. 1068.

The supervision of the admission of aliens into the United States may be intrusted by Congress either to the department of State, hav-

[35] The statement of the case is abridged and only a portion of the opinion is printed.

ing the general management of foreign relations, or to the Department of the Treasury, charged with the enforcement of the laws regulating foreign commerce; and Congress has often passed acts forbidding the immigration of particular classes of foreigners, and has committed the execution of these acts to the Secretary of the Treasury, to collectors of customs, and to inspectors acting under their authority. See, for instance, Act March 3, 1875, c. 141, 18 Stat. 477 (U. S. Comp. St. 1901, p. 1285); Act Aug. 3, 1882, c. 376, 22 Stat. 214 (U. S. Comp. St. 1901, p. 1288); Act Feb. 23, 1887, c. 220, 24 Stat. 414; Act Oct. 19, 1888, c. 1210, 25 Stat. 566 (U. S. Comp. St. 1901, p. 1294); as well as the various acts for the exclusion of the Chinese.

An alien immigrant, prevented from landing by any such officer claiming authority to do so under an act of Congress, and thereby restrained of his liberty, is doubtless entitled to a writ of habeas corpus to ascertain whether the restraint is lawful. Chew Heong v. U. S., 112 U. S. 536, 5 Sup. Ct. 255, 28 L. Ed. 770; U. S. v. Jung Ah Lung, 124 U. S. 621, 8 Sup. Ct. 663, 31 L. Ed. 591; Wan Shing v. U. S., 140 U. S. 424, 11 Sup. Ct. 729, 35 L. Ed. 503; Lau Ow Bew, Petitioner, 141 U. S. 583, 12 Sup. Ct. 43, 35 L. Ed. 868. And Congress may, if it sees fit, as in the statutes in question in U. S. v. Jung Ah Lung, just cited, authorize the courts to investigate and ascertain the facts on which the right to land depends. But, on the other hand, the final determination of those facts may be intrusted by Congress to executive officers; and in such a case, as in all others, in which a statute gives a discretionary power to an officer, to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to re-examine or controvert the sufficiency of the evidence on which he acted. Martin v. Mott, 12 Wheat. 19, 31, 6 L. Ed. 537; Railroad Co. v. Stimpson, 14 Pet. 448, 458, 10 L. Ed. 535; Benson v. McMahon, 127 U. S. 457, 8 Sup. Ct. 1240, 32 L. Ed. 234; In re Luis Oteiza y Cortes, 136 U. S. 330, 10 Sup. Ct. 1031, 34 L. Ed. 464. It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government. As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law. Murray v. Hoboken Co., 18 How. 272, 15 L. Ed. 572; Hilton v. Merritt, 110 U. S. 97, 3 Sup. Ct. 548, 28 L. Ed. 83. * * *

Before the hearing upon the writ of habeas corpus, Hatch was appointed by the Secretary of the Treasury inspector of immigra-

tion at the port of San Francisco, and, after making the inspection and examination required by the act of 1891, refused to allow the petitioner to land, and made a report to the collector of customs, stating facts which tended to show, and which the inspector decided did show, that she was a "person likely to become a public charge," and so within one of the classes of aliens "excluded from admission into the United States" by the first section of that act. And Hatch intervened in the proceedings on the writ of habeas corpus, setting up his decision in bar of the writ.

A writ of habeas corpus is not like an action to recover damages for an unlawful arrest or commitment, but its object is to ascertain whether the prisoner can lawfully be detained in custody; and, if sufficient ground for his detention by the government is shown, he is not to be discharged for defects in the original arrest or commitment. Ex parte Bollman, 4 Cranch, 75, 114, 125, 2 L. Ed. 554; Coleman v. Tennessee, 97 U. S. 509, 519, 24 L. Ed. 1118; U. S. v. McBratney, 104 U. S. 621, 624, 26 L. Ed. 869; Kelley v. Thomas, 15 Gray (Mass.) 192; King v. Marks, 3 East, 157; Shuttleworth's Case, 9 Q. B. 651.

The case must therefore turn on the validity and effect of the action of Hatch as inspector of immigration.

Section 7 of the act of 1891 establishes the office of superintendent of immigration, and enacts that he "shall be an officer in the Treasury Department, under the control and supervision of the Secretary of the Treasury." By section 8, "the proper inspection officers" are required to go on board any vessel bringing alien immigrants, and to inspect and examine them, and may for this purpose remove and detain them on shore, without such removal being considered a landing, and "shall have power to administer oaths, and to take and consider testimony touching the right of any such aliens to enter the United States, all of which shall be entered of record." "All decisions made by the inspection officers or their assistants touching the right of any alien to land, when adverse to such right, shall be final unless appeal be taken to the superintendent of immigration, whose action shall be subject to review by the Secretary of the Treasury;" and the Secretary of the Treasury may prescribe rules for inspection along the borders of Canada, British Columbia, and Mexico, "provided that not exceeding one inspector shall be appointed for each customs district." * * *

It was also argued that Hatch's proceedings did not conform to section 8 of the act of 1891, because it did not appear that he took testimony on oath, and because there was no record of any testimony or of his decision. But the statute does not require inspectors to take any testimony at all, and allows them to decide on their own inspection and examination the question of the right of any alien immigrant to land. The provision relied on merely empowers in-

spectors to administer oaths, and to take and consider testimony, and requires only testimony so taken to be entered of record.

The decision of the inspector of immigration being in conformity with the act of 1891, there can be no doubt that it was final and conclusive against the petitioner's right to land in the United States. The words of section 8 are clear to that effect, and were manifestly intended to prevent the question of an alien immigrant's right to land, when once decided adversely by an inspector, acting within the jurisdiction conferred upon him, from being impeached or reviewed, in the courts or otherwise, save only by appeal to the inspector's official superiors, and in accordance with the provisions of the act. Section 13, by which the Circuit and District Courts of the United States are "invested with full and concurrent jurisdiction of all causes, civil and criminal, arising under any of the provisions of this act," evidently refers to causes of judicial cognizance, already provided for, whether civil actions in the nature of debt for penalties under sections 3 and 4, or indictments for misdemeanors under sections 6, 8, and 10. Its intention was to vest concurrent jurisdiction of such causes in the Circuit and District Courts, and it is impossible to construe it as giving the courts jurisdiction to determine matters which the act has expressly committed to the final determination of executive officers.

The result is that the act of 1891 is constitutional and valid; the inspector of immigration was duly appointed; his decision against the petitioner's right to land in the United States was within the authority conferred upon him by that act; no appeal having been taken to the superintendent of immigration, that decision was final and conclusive; the petitioner is not unlawfully restrained of her liberty; and the order of the Circuit Court is affirmed.[36]

Mr. Justice BREWER dissented.

[36] See Lem Moon Sing v. United States, 158 U. S. 538, 15 Sup. Ct. 967, 39 L. Ed. 1082 (1895), where the administrative jurisdiction was held to be exclusive with reference to the right of re-entry of an alien who had been domiciled in the United States, and had temporarily left the country.

The Chinese exclusion acts provided for a judicial hearing (United States v. Jung Ah Lung, 124 U. S. 621, 8 Sup. Ct. 663, 31 L. Ed. 591, [1888]), until by Act Aug. 18, 1894, c. 301, 28 Stat. 390 (U. S. Comp. St. 1901, p. 1303), the administrative determination was made conclusive as to all aliens; but this did not apply to the provision for the removal of a Chinese person found to be unlawfully in the United States. Chin Bak Kan v. U. S., 186 U. S. 193, 22 Sup. Ct. 891, 46 L. Ed. 1121 (1902).

That an alien may be summarily deported, see Yamataya v. Fisher, 189 U. S. 86, 23 Sup. Ct. 611, 47 L. Ed. 721 (1903).

DEBATE IN THE HOUSE OF LORDS, AUGUST 3, 1905, ON ALIENS' BILL.

(Hansard, vol. 151, p. 7.)

Lord Coleridge moved to omit the appeal by the immigrant to the immigration board, and to substitute "to the court of summary jurisdiction at the port, and that court shall, if they are satisfied that leave to land should not be withheld under this act, give leave to land, and any person aggrieved by an order, judgment, or determination of such court may appeal in manner provided by the summary jurisdiction acts to a court of quarter sessions." The substance of this amendment was to substitute a court of summary jurisdiction for the immigration board. In that he was following the proposals of the majority report of the commission, in which they recommended that the alien immigrant who, within two years of his arrival, was ascertained or was reasonably supposed to be under the various headings might be ordered by a court of summary jurisdiction to leave this country. Under the bill the decision would lie first of all with the immigrant officer, who, of course, would be a man of no judicial experience. The only appeal then was to an immigration board, consisting of three persons appointed by the Secretary of State.

The questions which this board would have to decide were very grave and very intricate. They would have to decide on the supposed lunacy of an immigrant; they would have to decide on the very nice question as to whether the offense which was supposed to have been committed was or was not of a political character, a matter which called for the exercise of a judicial decision; they would also have to decide under the succeeding subsection whether or not he was coming to this country to avoid prosecution on religious or political grounds, another very nice question. All these questions would have to be decided, according to the provisions of the bill, by a board which had no judicial character at all. There was no provision in the bill to insure the proceedings before this immigration board being on oath. They knew that the Secretary of State might provide rules, but they did not know what those rules would be. The amendment would not in any sense interfere with the main object of the bill. It was only an administrative alteration, and did not in any way go to the root and principle of the bill; and as it had been recommended by the commission he hoped the noble and learned Lord who presided over that body would give him his support. He thought that the alien, before he was prevented from landing, should know that he had been considered an undesirable alien by a proper court judically constituted.

Lord Belper hoped the House would not accept the amendment. * * * The board would have no question of law to deal with,

but questions of fact, of which absolute legal proof might be impossible. The Secretary of State had insured, as far as he could, that one of those who were appointed on the board should be a magistrate, and it was intended that as far as possible a magistrate should be the chairman. The two other members were to be, as far as could be arranged, men of business and administrative experience. If the amendment of the noble and learned Lord were carried, it would make the bill practically unworkable. In the first instance the matter would have to go to a court of summary jurisdiction; but if there was to be an appeal to quarter sessions, as in all cases of dispute there would be, that might mean a delay of two or three months. What was to be done with the alien who was landed for the purpose of this inquiry during that time? It would make the bill unworkable if the decision in his case were to be delayed for any such length of time as that. For that reason, and because His Majesty's government thought the body suggested by the bill would be a proper one for the purpose, he could not accept the amendment.

The proposed amendment was rejected by a vote of 68 to 16.

SECTION 78.—SAME—QUESTION OF ALIENAGE AS QUESTION OF LAW

GONZALES v. WILLIAMS.

(Supreme Court of United States, 1904. 192 U. S. 1, 24 Sup. Ct. 171, 48 L. Ed. 317.)

Appeal from the Circuit Court of the United States for the Southern District of New York to review an order dismissing a writ of habeas corpus to inquire into the detention by the immigration commissioner of a native of Porto Rico at the port of New York as an alien immigrant. Reversed and remanded, with directions to discharge the immigrant.

Mr. Chief Justice FULLER delivered the opinion of the court.[37]

This is an appeal by Isabella Gonzales from an order of the Circuit Court of the United States for the Southern District of New York, dismissing a writ of habeas corpus issued on her behalf, and remanding her to the custody of the United States commissioner of immigration at the port of New York. 118 Fed. 941.

Isabella Gonzales, an unmarried woman, was born and resided in Porto Rico, and was an inhabitant thereof on April 11, 1899, the date of the proclamation of the Treaty of Paris (30 Stat. 1754). She

[37] Only a portion of the opinion of Fuller, C. J., is printed.

arrived at the port of New York from Porto Rico August 24, 1902, when she was prevented from landing, and detained by the immigration commissioner at that port as an "alien immigrant," in order that she might be returned to Porto Rico if it appeared that she was likely to become a public charge.

If she was not an alien immigrant within the intent and meaning of the act of Congress entitled "An act in amendment to the various acts relative to immigration and the importation of aliens under contract or agreement to perform labor," approved March 3, 1891 (26 Stat. 1084, c. 551 [U. S. Comp. St. 1901, pp. 1294, 1296]), the commissioner had no power to detain or deport her, and the final order of the Circuit Court must be reversed.

The act referred to contains these provisions:

"That the following classes of aliens shall be excluded from admission into the United States, in accordance with the existing acts regulating immigration, other than those concerning Chinese laborers: All idiots, insane persons, paupers, or persons likely to become a public charge. * * *

"Sec. 8. That, upon the arrival by water at any place within the United States of any alien immigrants it shall be the duty of the commanding officer and the agents of the steam or sailing vessel by which they came to report the name, nationality, last residence, and destination of every such alien, before any of them are landed, to the proper inspection officers. * * * All decisions made by the inspection officers or their assistants touching the right of any alien to land, when adverse to such right, shall be final, unless appeal be taken to the superintendent of immigration, whose action shall be subject to review by the Secretary of the Treasury. It shall be the duty of the aforesaid officers and agents of such vessel to adopt due precautions to prevent the landing of any alien immigrant at any place or time other than that designated by the inspection officers, and any such officer or agent or person in charge of such vessel who shall either knowingly or negligently land, or permit to land, any alien immigrant at any place or time other than that designated by the inspection officers, shall be deemed guilty of a misdemeanor. * * *

"Sec. 10. That all aliens who may unlawfully come to the United States shall, if practicable, be immediately sent back on the vessel by which they were brought in. * * *

"Sec. 11. That any alien who shall come into the United States in violation of law may be returned as by law provided. * * *"

The treaty ceding Porto Rico to the United States was ratified by the Senate February 6, 1899; Congress passed an act to carry out its obligations March 2, 1899 (30 Stat. 993, c. 376); and the ratifications were exchanged and the treaty proclaimed April 11, 1899 (30 Stat. 1754). Then followed the act entitled "An act temporarily to provide revenues and a civil government for Porto Rico, and

for other purposes," approved April 12, 1900. 31 Stat. 77, c. 191.
* * *

By section 7 the inhabitants of Porto Rico, who were Spanish subjects on the day the treaty was proclaimed, including Spaniards of the Peninsula who had not elected to preserve their allegiance to the Spanish crown, were to be deemed citizens of Porto Rico, and they and citizens of the United States residing in Porto Rico were constituted a body politic under the name of the People of Porto Rico.

Gonzales was a native inhabitant of Porto Rico and a Spanish subject, though not of the Peninsula, when the cession transferred her allegiance to the United States, and she was a citizen of Porto Rico under the act. And there was nothing expressed in the act, nor reasonably to be implied therefrom, to indicate the intention of Congress that citizens of Porto Rico should be considered as aliens, and the right of free access denied to them.

Counsel for the government contends that the test of Gonzales' rights was citizenship of the United States, and not alienage. We do not think so, and, on the contrary, are of opinion that, if Gonzales were not an alien within the act of 1891, the order below was erroneous.

Conceding to counsel that the general term "alien," "citizen," "subject," are not absolutely inclusive, or completely comprehensive, and that, therefore, neither of the numerous definitions of the term "alien" is necessarily controlling, we, nevertheless, cannot concede, in view of the language of the treaty and of the act of April 12, 1900, that the word "alien," as used in the act of 1891, embraces the citizens of Porto Rico.

We are not required to discuss the power of Congress in the premises; or the contention of Gonzales' counsel that the cession of Porto Rico accomplished the naturalization of its people; or that of Commissioner Degetau, in his excellent argument as amicus curiæ, that a citizen of Porto Rico, under the act of 1900, is necessarily a citizen of the United States. The question is the narrow one whether Gonzales was an alien within the meaning of that term as used in the act of 1891.

The act excludes from admission into the United States, "in accordance with the existing acts regulating immigration other than those concerning Chinese laborers," certain classes of "aliens" or "alien immigrants" arriving at any place within the United States, in respect of all of whom it is required that the commanding officer and agents of the vessel by which they come shall report the name, nationality, last residence and destination before any are landed.

The decisions of the inspection officers adverse to the right to land are made final unless an appeal is taken to the superintendent of immigration, whose action is subject to review by the Secretary of the Treasury; and all aliens who unlawfully come into the United

States in violation of law shall be immediately, if practicable, sent back, or may be returned as by law provided.

We think it clear that the act relates to foreigners as respects this country, to persons owing allegiance to a foreign government, and citizens or subjects thereof, and that citizens of Porto Rico, whose permanent allegiance is due to the United States, who live in the peace of the dominion of the United States, the organic law of whose domicile was enacted by the United States, and is enforced through officials sworn to support the Constitution of the United States, are not "aliens," and upon their arrival by water at the port of our mainland are not "alien immigrants," within the intent and meaning of the act of 1891. * * *

And in the present case, as Gonzales did not come within the act of 1891, the commissioner had no jurisdiction to detain and deport her by deciding the mere question of law to the contrary; and she was not obliged to resort to the superintendent or the Secretary.

Our conclusion is not affected by the provision in the sundry civil act of August 18, 1894 (28 Stat. 372, 390, c. 301 [U. S. Comp. St. 1901, p. 1303]), in relation to the finality of the decision of the appropriate immigration or custom officers, or the similar provision in the act "to regulate the immigration of aliens into the United States," approved March 3, 1903 (32 Stat. 1213, c. 1012 [U. S. Comp. St. Supp. 1903, p. 170]). The latter act was approved after the Gonzales litigation was moved, but it is worthy of notice that the words "United States" as used in the title and throughout the act were required to be construed to mean "the United States and any waters, territory, or other place now subject to the jurisdiction thereof." Section 33. The definition indicates the view of Congress on the general subject.

Gonzales was not a passenger from a foreign port, and was a passenger "from territory or other place" subject to the jurisdiction of the United States.

In order to dispose of the case in hand, we do not find it necessary to review the Chinese exclusion acts and the decisions of this court thereunder.

Final order reversed, and cause remanded, with a direction to discharge Gonzales.

SECTION 79.—SAME—QUESTION OF ALIENAGE AS QUESTION OF FACT

UNITED STATES v. SING TUCK et al.

(Supreme Court of United States, 1904. 194 U. S. 161, 24 Sup. Ct. 621, 48 L. Ed. 917.)

On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which reversed a judgment of the Circuit Court for the Northern District of New York dismissing a writ of habeas corpus to inquire into a detention of Chinese persons seeking to enter the United States, and claiming citizenship therein. Reversed.

Mr. Justice HOLMES delivered the opinion of the court.

This is a writ of habeas corpus against a Chinese inspector and inspector of immigration. It appears from his return that the Chinese persons concerned came from China by way of Canada, and were seeking admission into the United States. On examination by an inspector five gave their names, stated that they were born in the United States (United States v. Wong Kim Ark, 169 U. S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890), and answered no further questions. The rest gave their names and then stood mute, not even alleging citizenship. The inspector decided against their right to enter the country, and informed them of their right to appeal to the Secretary of Commerce and Labor. No appeal was taken, and while they were detained at a properly designated detention house for return to China, a petition was filed by a lawyer purporting to act on their behalf, alleging that they all were citizens of the United States, and this writ was obtained. In the Circuit Court the detention was adjudged to be lawful, and the writ was dismissed without a trial on the merits. This decision was reversed by the Circuit Court of Appeals on the ground that the parties concerned were entitled to a judicial investigation of their status.

By Act August 18, 1894, c. 301, 28 Stat. 390 (U. S. Comp. St. 1901, p. 1303), "in every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of the Treasury." The jurisdiction of the Treasury Department was transferred to the Department of Commerce and Labor by Act Feb. 14, 1903, c. 552, 32 Stat. 825 (U. S. Comp. St. Supp. 1909, p. 87). It was held by the Circuit Court of Appeals that the act of 1894 should not be con-

strued to submit the right of a native-born citizen of the United States to return hither to the final determination of executive officers, and the conclusion was assumed to follow that these cases should have been tried on their merits. Before us it was argued that, by the construction of the statute, the fact of citizenship went to the jurisdiction of the immigration officers (see Gonzales v. Williams, 192 U. S. 1, 7, 24 Sup. Ct. 177, 48 L. Ed. 317; Miller v. Horton, 152 Mass. 540, 548, 26 N. E. 100, 10 L. R. A. 116, 23 Am. St. Rep. 850), and therefore that the statute did not purport to apply to one who was a citizen in fact. We are of opinion, however, that the words quoted apply to a decision on the question of citizenship, and that, even if it be true that the statute could not make that decision final, the consequence drawn by the Circuit Court of Appeals does not follow, and is not correct.

We shall not argue the meaning of the words of the act. That must be taken to be established. Lem Moon Sing v. United States, 158 U. S. 538, 546, 547, 15 Sup. Ct. 967, 39 L. Ed. 1082, 1085. As to whether or not the act could make the decision of an executive officer final upon the fact of citizenship, we leave the question where we find it. Japanese Immigrant Case, 189 U. S. 86, 97, 23 Sup. Ct. 611, 47 L. Ed. 721, 724; Fok Young Yo v. United States, 185 U. S. 296, 304, 305, 22 Sup. Ct. 686, 46 L. Ed. 917, 921. See Chin Bak Kan v. United States, 186 U. S. 193, 200, 22 Sup. Ct. 891, 46 L. Ed. 1121, 1126. Whatever may be the law on that point, the decisions just cited are enough to show that it is too late to contend that the act of 1894 is void as a whole. But if the act is valid, even if ineffectual on this single point, then it points out a mode of procedure which must be followed before there can be a resort to the courts. In order to act at all the executive officer must decide upon the question of citizenship. If his jurisdiction is subject to being upset, still it is necessary that he should proceed if he decides that it exists. An appeal is provided by the statute. The first mode of attacking his decision is by taking that appeal. If the appeal fails, it then is time enough to consider whether, upon a petition showing reasonable cause, there ought to be a further trial upon habeas corpus.

We perfectly appreciate, while we neither countenance nor discountenance, the argument drawn from the alleged want of jurisdiction. But while the consequence of that argument, if sound, is that both executive officers and Secretary of Commerce and Labor are acting without authority, it is one of the necessities of the administration of justice that even fundamental questions should be determined in an orderly way. If the allegations of a petition for habeas corpus setting up want of jurisdiction, whether of an executive officer or of an ordinary court, are true, the petitioner theoretically is entitled to his liberty at once. Yet a summary interruption of the regular order of proceedings, by means of the writ,

is not always a matter of right. A familiar illustration is that of a person imprisoned upon criminal process by a state court, under a state law alleged to be unconstitutional. If the law is unconstitutional the prisoner is wrongfully held. Yet, except under exceptional circumstances, the courts of the United States do not interfere by habeas corpus. The prisoner must, in the first place, take his case to the highest court of the state to which he can go, and after that he generally is left to the remedy by writ of error if he wishes to bring the case here. Minnesota v. Brundage, 180 U. S. 499, 21 Sup. Ct. 455, 45 L. Ed. 639. Baker v. Grice, 169 U. S. 284, 18 Sup. Ct. 323, 42 L. Ed. 748. In Gonzales v. Williams, 192 U. S. 1, 24 Sup. Ct. 177, 48 L. Ed. 317, there was no use in delaying the issue of the writ until an appeal had been taken, because in that case there was no dispute about the facts, but merely a question of law. Here the issue, if there is one, is pure matter of fact—a claim of citizenship under circumstances and in a form naturally raising a suspicion of fraud.

Considerations similar to those which we have suggested lead to a further conclusion. Whatever may be the ultimate rights of a person seeking to enter the country, and alleging that he is a citizen, it is within the power of Congress to provide, at least, for a preliminary investigation by an inspector, and for a detention of the person until he has established his citizenship in some reasonable way. If the person satisfies the inspector, he is allowed to enter the country without further trial. Now, when these Chinese, having that opportunity, saw fit to refuse it, we think an additional reason was given for not allowing a habeas corpus at that stage. The detention during the time necessary for investigation was not unlawful, even if all these parties were citizens of the United States, and were not attempting to upset the inspection machinery by a transparent device. Wong Wing v. United States, 163 U. S. 228, 235, 16 Sup. Ct. 977, 41 L. Ed. 140. They were offered a way to prove their alleged citizenship and to be set at large, which would be sufficient for most people who had a case, and which would relieve the courts. If they saw fit to refuse that way, they properly were held down strictly to their technical rights.

But it is said that if, under any circumstances, the question of citizenship could be left to the final decision of an executive officer, the Chinese regulations made under the statutes by the Department of Commerce and Labor are such that they do not allow a citizen due process of law, and the same argument is urged in favor of the right to decline to take any part in such proceedings from the outset. The rules objected to require the officer to prevent communication with the parties other than by officials under his control, and to have them examined promptly touching their right to admission. The examination is to be apart from the public, in the presence of the government officials and such witnesses only as the examining

officer shall designate. This last is the provision especially stigmatized. It is said that the parties are allowed to produce only such witnesses as are designated by the officer. But that is a plain perversion of the meaning of the words. If the witnesses referred to are not merely witnesses to the examination, if they are witnesses in the cause, still the provision only excludes such witnesses at the discretion of the officer pending the examination of the party concerned—a natural precaution in this class of cases, the reasonableness of which does not need to be explained. It is common in ordinary trials. No right is given to the officer to exercise any control or choice as to the witnesses to be heard, and no such choice was attempted in fact. On the contrary, the parties were told that if they could produce two witnesses who knew that they had the right to enter, their testimony would be taken and carefully considered; and various other attempts were made to induce the suggestion of any evidence or help to establish the parties' case, but they stood mute. The separate examination is another reasonable precaution, and it is required to take place promptly, to avoid the hardship of a long detention. In case of appeal counsel are permitted to examine the evidence (rule 7), and it is implied that new evidence, briefs, affidavits, and statements may be submitted, all of which can be forwarded with the appeal (rule 9). The whole scheme is intended to give as fair a chance to prove a right to enter the country as the necessarily summary character of the proceedings will permit.

We are of opinion that the attempt to disregard and override the provisions of the statutes and the rules of the department, and to swamp the courts by a resort to them in the first instance, must fail. We may add that, even if it is beyond the power of Congress to make the decision of the department final upon the question of citizenship, we agree with the Circuit Court of Appeals that a petition for habeas corpus ought not to be entertained unless the court is satisfied that the petitioner can make out at least a prima facie case. A mere allegation of citizenship is not enough. But, before the courts can be called upon, the preliminary sifting process provided by the statutes must be gone through with. Whether after that a further trial may be had we do not decide.

Judgment reversed.

Mr. Justice BREWER and Mr. Justice PECKHAM dissented.

UNITED STATES v. JU TOY.

(Supreme Court of the United States. 1905. 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040.)

On a certificate from the United States Circuit Court of Appeals for the Ninth Circuit presenting the question whether habeas corpus

should be granted in behalf of a person of Chinese descent whose right to enter the United States has been denied by the immigration officers and affirmed on appeal by the Secretary of Commerce and Labor, and citizenship is the only ground alleged as making the detention unlawful, and whether, under such circumstances, the writ should be dismissed or a further hearing be granted, and whether the decision of the Secretary of Commerce and Labor is conclusive, in the absence of abuse of authority. The first question answered in the negative, the third in the affirmative, and the second by stating that the writ should be dismissed.

Mr. Justice HOLMES delivered the opinon of the court.

This case comes here on a certificate from the Circuit Court of Appeals presenting certain questions of law. It appears that the appellee, being detained by the master of the steamship Doric for return to China, presented a petition for habeas corpus to the District Court, alleging that he was a native-born citizen of the United States, returning after a temporary departure, and was denied permission to land by the collector of the port of San Francisco. It also appears from the petition that he took an appeal from the denial, and that the decision was affirmed by the Secretary of Commerce and Labor. No further grounds are stated. The writ issued, and the United States made return, and answered, showing all the proceedings before the department, which are not denied to have been in regular form, and setting forth all of the evidence and the orders made. The answer also denied the allegations of the petition. Motions to dismiss the writ were made on the grounds that the decision of the Secretary was conclusive, and that no abuse of authority was shown. These were denied, and the District Court decided, seemingly on new evidence, subject to exceptions, that Ju Toy was a native-born citizen of the United States. An appeal was taken to the Circuit Court of Appeals, alleging errors the nature of which has been indicated. Thereupon the latter court certified the following questions:

"First. Should a District Court of the United States grant a writ of habeas corpus in behalf of a person of Chinese descent being held for return to China by the steamship company which brought him therefrom, who, having recently arrived at a port of the United States, made application to land as a native-born citizen thereof, and who, after examination by the duly authorized immigration officers, was found by them not to have been born in the United States, was denied admission, and ordered deported, which finding and action upon appeal was affirmed by the Secretary of Commerce and Labor, when the foregoing facts appear to the court, and the petition for the writ alleges unlawful detention on the sole ground that petitioner does not come within the restrictions of the Chinese exclusion acts, because born in and a citizen of the United States, and does not allege or show in any other way unlawful action or abuse of their discretion or powers by the immigration officers who excluded him?

"Second. In a habeas corpus proceeding should a District Court of the United States dismiss the writ, or should it direct a new or further hearing upon evidence to be presented where the writ had been granted in behalf of a person of Chinese descent being held by the steamship company for return to China, from whence it brought him, who recently arrived from that country, and asked permission to land, upon the ground that he was born in and was a citizen of the United States, when the uncontradicted return and answer show that such person was granted a hearing by the proper immigration officers, who found he was not born in the United States, that his application for admission was considered and denied by such officers, and that the denial was affirmed upon appeal to the Secretary of Commerce and Labor, and where nothing more appears to show that such executive officers failed to grant a proper hearing, abused their discretion, or acted in any unlawful or improper way upon the case presented to them for determination?

"Third. In a habeas corpus proceeding in a District Court of the United States, instituted in behalf of a person of Chinese descent being held for return to China by the steamship company which recently brought him therefrom to a port of the United States, and who applied for admission therein upon the ground that he was a native-born citizen thereof, but who, after a hearing, the lawfully designated immigration officers found was not born therein, and to whom they denied admission, which finding and denial, upon appeal to the Secretary of Commerce and Labor, was affirmed—should the court treat the finding and action of such executive officers upon the question of citizenship and other questions of fact as having been made by a tribunal authorized to decide the same, and as final and conclusive unless it be made affirmatively to appear that such officers, in the case submitted to them, abused the discretion vested in them, or, in some other way, in hearing and determining the same, committed prejudicial error?"

We assume in what we have to say, as the questions assume, that no abuse of authority of any kind is alleged. That being out of the case, the first of them is answered by the case of United States v. Sing Tuck, 194 U. S. 161, 170, 24 Sup. Ct. 621, 48 L. Ed. 917, 921: "A petition for habeas corpus ought not to be entertained unless the court is satisfied that the petitioner can make out at least a prima facie case." This petition should have been denied on this ground, irrespective of what more we have to say, because it alleged nothing except citizenship. It disclosed neither abuse of authority nor the existence of evidence not laid before the Secretary. It did not even set forth that evidence, or allege its effect. But, as it was entertained, and the District Court found for the petitioner, it would be a severe measure to order the petition to be dismissed on that ground now, and we pass on to further considerations.

The broad question is presented whether or not the decision of the Secretary of Commerce and Labor is conclusive. It was held in United States v. Sing Tuck, 194 U. S. 161, 167, 24 Sup. Ct. 621, 48 L. Ed. 917, 920, that Act Aug. 18, 1894, c. 301, § 1, 28 Stat. 372, 390, (U. S. Comp. St. 1901, p. 1303), purported to make it so, but whether the statute could have that effect constitutionally was left untouched, except by a reference to cases where an opinion already had been expressed.

To quote the latest first, in Japanese Immigrant Case (Yamataya v. Fisher) 189 U. S. 86, 97, 23 Sup. Ct. 611, 613, 47 L. Ed. 721, 724, it was said: "That Congress may exclude aliens of a particular race from the United States, prescribe the terms and conditions upon which certain classes of aliens may come to this country, establish regulations for sending out of the country such aliens as come here in violation of law, and commit the enforcement of such provisions, conditions, and regulations exclusively to executive officers, without judicial intervention, are principles firmly established by the decisions of this court." See, also, United States ex rel. Turner v. Williams, 194 U. S. 279, 290, 291, 24 Sup. Ct. 719, 48 L. Ed. 979, 983, 984; Chin Bak Kan v. United States, 186 U. S. 193, 200, 22 Sup. Ct. 891, 46 L. Ed. 1121, 1125. In Fok Young Yo v. United States, 185 U. S. 296, 304, 305, 22 Sup. Ct. 686, 46 L. Ed. 917, 921, it was held that the decision of the collector of customs on the right of transit across the territory of the United States was conclusive, and, still more to the point, in Lem Moon Sing v. United States, 158 U. S. 538, 15 Sup. Ct. 967, 39 L. Ed. 1082, where the petitioner for habeas corpus alleged facts which, if true, gave him a right to enter and remain in the country, it was held that the decision of the collector was final as to whether or not he belonged to the privileged class.

It is true that it may be argued that these cases are not directly conclusive of the point now under decision. It may be said that the parties concerned were aliens, and that although they alleged absolute rights, and facts which it was contended went to the jurisdiction of the officer making the decision, still their rights were only treaty or statutory rights, and therefore were subject to the implied qualification imposed by the later statute, which made the decision of the collector with regard to them final. The meaning of the cases, and the language which we have quoted, is not satisfied by so narrow an interpretation, but we do not delay upon them. They can be read.

It is established, as we have said, that the act purports to make the decision of the department final, whatever the ground on which the right to enter the country is claimed—as well when it is citizenship as when it is domicile, and the belonging to a class excepted from the exclusion acts. United States v. Sing Tuck, 194 U. S. 161, 167, 24 Sup. Ct. 621, 48 L. Ed. 917, 920; Lem Moon Sing v. United States. 158 U. S. 538, 546, 547, 15 Sup. Ct. 967, 39 L. Ed. 1082. It also is established by the former case and others which it cites that the rele-

vant portion of the act of August 18, 1894, c. 301, 28 Stat. 372 (U. S. Comp. St. 1901, p. 1303) is not void as a whole. The statute has been upheld and enforced. But the relevant portion being a single section, accomplishing all its results by the same general words, must be valid as to all that it embraces, or altogether void. An exception of a class constitutionally exempted cannot be read into those general words merely for the purpose of saving what remains. That has been decided over and over again. United States v. Reese, 92 U. S. 214, 221, 23 L. Ed. 563, 565; Trade-Mark Cases, 100 U. S. 82, 98, 99, 25 L. Ed. 550, 553, 554; Allen v. Louisiana, 103 U. S. 80, 84, 26 L. Ed. 318, 319; United States v. Harris, 106 U. S. 629, 641, 642, 1 Sup. Ct. 601, 27 L. Ed. 290, 294, 295; Poindexter v. Greenhow, 114 U. S. 270, 305, 5 Sup. Ct. 903, 962, 29 L. Ed. 185, 197; Baldwin v. Franks, 120 U. S. 678, 685–689, 7 Sup. Ct. 656, 763, 30 L. Ed. 766, 768, 769; Smiley v. Kansas, 196 U. S. 447, 455, 25 Sup. Ct. 289, 49 L. Ed. 546. It necessarily follows that when such words are sustained, they are sustained to their full extent.

In view of the cases which we have cited it seems no longer open to discuss the question propounded as a new one. Therefore we do not analyze the nature of the right of a person presenting himself at the frontier for admission. In re Ross (Ross v. McIntyre), 140 U. S. 453, 464, 11 Sup. Ct. 897, 35 L. Ed. 581, 586. But it is not improper to add a few words. The petitioner, although physically within our boundaries, is to be regarded as if he had been stopped at the limit of our jurisdiction, and kept there while his right to enter was under debate. If, for the purpose of argument, we assume that the fifth amendment applies to him, and that to deny entrance to a citizen is to deprive him of liberty, we nevertheless are of opinion that with regard to him due process of law does not require judicial trial. That is the result of the cases which we have cited, and the almost necessary result of the power of Congress to pass exclusion laws. That the decision may be intrusted to an executive officer, and that his decision is due process of law, was affirmed and explained in Nishimura Ekiu v. United States, 142 U. S. 651, 660, 12 Sup. Ct. 336, 35 L. Ed. 1146, 1149, and in Fong Yue Ting v. United States, 149 U. S. 698, 713, 13 Sup. Ct. 1016, 37 L. Ed. 905, 913, before the authorities to which we already have referred. It is unnecessary to repeat the often-quoted remarks of Mr. Justice Curtis, speaking for the whole court in Den ex dem. Murray v. Hoboken Land & Improv. Co., 18 How. 272, 280, 15 L. Ed. 372, 376, to show that the requirement of a judicial trial does not prevail in every case. Lem Moon Sing v. United States, 158 U. S. 538, 546, 547, 15 Sup. Ct. 967, 39 L. Ed. 1082, 1085; Japanese Immigrant Case (Yamataya v. Fisher), 189 U. S. 86, 100, 23 Sup. Ct. 611, 47 L. Ed. 721, 725; Public Clearing House v. Coyne, 194 U. S. 497, 508, 509, 24 Sup. Ct. Rep. 789, 48 L. Ed. 1092, 1098.

We are of opinion that the first question should be answered, no; that the third question should be answered, yes, with the result that

the second question should be answered that the writ should be dismissed, as it should have been dismissed in this case.

It will be so certified.

Mr. Justice BREWER dissented.

CHIN YOW v. UNITED STATES.

(Supreme Court of the United States, 1908. 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369.)

Appeal from the District Court of the United States for the Northern District of California to review an order denying the petition for a writ of habeas corpus in behalf of a Chinese person in the custody of a steamship company for deportation. Reversed with directions to issue the writ.

Mr. Justice HOLMES delivered the opinion of the court.

This is a petition for habeas corpus by a Chinese person, alleging that he is detained unlawfully by the general manager of the Pacific Mail Steamship Company on the ground that he is not entitled to enter the United States. The petition alleges that the petitioner is a resident and citizen of the United States, born in San Francisco of parents domiciled there, but it discloses that the commissioner of immigration at the port of San Francisco, after a hearing, denied his right to land, and that the Department of Commerce and Labor affirmed the decision on appeal. The petitioner thereupon was placed in custody of the steamship company to be sent to China. So far the case is within United States v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040, and the petition was dismissed for want of jurisdiction (presumably on the ground of that decision), as sufficiently appears from the record, the reasons assigned for the appeal, and the order allowing the same.

But the petition further alleges that the petitioner was prevented by the officials of the commisioner from obtaining testimony, including that of named witnesses, and that had he been given a proper opportunity he could have produced overwhelming evidence that he was born in the United States and remained there until 1904, when he departed to China on a temporary visit. We do not scrutinize the allegations as if they were contained in a criminal indictment before the court upon a special demurrer, but without further detail read them as importing that the petitioner arbitrarily was denied such a hearing, and such an opportunity to prove his right to enter the country, as the statute meant that he should have. The question is whether he is entitled to a writ of habeas corpus on such a case as that.

Of course, if the writ is granted, the first issue to be tried is the truth of the allegations last mentioned. If the petitioner was not denied a fair opportunity to produce the evidence that he desired, or

a fair though summary hearing, the case can proceed no farther. Those facts are the foundation of the jurisdiction of the District Court, if it has any jurisdiction at all. It must not be supposed that the mere allegation of the facts opens the merits of the case, whether those facts are proved or not. And, by way of caution, we may add that jurisdiction would not be established simply by proving that the commissioner and the Department of Commerce and Labor did not accept certain sworn statements as true, even though no contrary or impeaching testimony was adduced. But, supposing that it could be shown to the satisfaction of the district judge that the petitioner had been allowed nothing but the semblance of a hearing, as we assume to be alleged, the question is, we repeat, whether habeas corpus may not be used to give the petitioner the hearing that he has been denied.

The statutes purport to exclude aliens only. They create or recognize, for present purposes it does not matter which, the right of citizens outside the jurisdiction to return to the United States. If one alleging himself to be a citizen is not allowed a chance to establish his right in the mode provided by those statutes, although that mode is intended to be exclusive, the statutes cannot be taken to require him to be turned back without more. The decision of the department is final, but that is on the presupposition that the decision was after a hearing in good faith, however summary in form. As between the substantive right of citizens to enter and of persons alleging themselves to be citizens to have a chance to prove their allegation, on the one side, and the conclusiveness of the commissioner's fiat, on the other, when one or the other must give way, the latter must yield. In such a case something must be done, and it naturally falls to be done by the courts. In order to decide what, we must analyze a little.

If we regard the petitioner, as in Ju Toy's Case it was said that he should be regarded, as if he had been stopped and kept at the limit of our jurisdiction (198 U. S. 263, 25 Sup. Ct. 644, 49 L. Ed. 1044), still it would be difficult to say that he was not imprisoned, theoretically as well as practically, when to turn him back meant that he must get into a vessel against his wish and be carried to China. The case would not be that of a person simply prevented from going in one direction that he desired and had a right to take, all others being left open to him, a case in which the judges were not unanimous in Bird v. Jones, 7 Q. B. 742. But we need not speculate upon niceties. It is true that the petitioner gains no additional right of entrance by being allowed to pass the frontier in custody for the determination of his case. But, on the question whether he is wrongly imprisoned, we must look at the actual facts. De facto he is locked up until carried out of the country against his will.

The petitioner then is imprisoned for deportation without the process of law to which he is given a right. Habeas corpus is the usual remedy for unlawful imprisonment. But, on the other hand, as yet the petitioner has not established his right to enter the country. He

is imprisoned only to prevent his entry, and an unconditional release would make the entry complete without the requisite proof. The courts must deal with the matter somehow, and there seems to be no way so convenient as a trial of the merits before the judge. If the petitioner proves his citizenship, a longer restraint would be illegal. If he fails, the order of deportation would remain in force.

We recur in closing to the caution stated at the beginning, and add that, while it is not likely, it is possible, that the officials misinterpreted rule 6 as restricting the right to obtain witnesses which the petitioner desired to produce, or rule 7, commented on in United States v. Sing Tuck, 194 U. S. 161, 169, 170, 24 Sup. Ct. 621, 48 L. Ed. 917, 921, as giving them some control or choice as to the witnesses to be heard. But, unless and until it is proved to the satisfaction of the judge that a hearing properly so called was denied, the merits of the case are not open, and, we may add, the denial of a hearing cannot be established by proving that the decision was wrong.

Order reversed. Writ of habeas corpus to issue.

Mr. Justice BREWER concurs in the result.

SECTION 80.—PUBLIC LANDS

UNITED STATES v. MINOR.

(Supreme Court of the United States, 1885. 114 U. S. 233, 5 Sup. Ct. 836, 29 L. Ed. 110.)

Appeal from the Circuit Court of the United States for the District of California.

This is an appeal from a decree of the Circuit Court for the District of California, dismissing the bill of the United States on demurrer. The object of the bill was to set aside and annul a patent issued by the United States to Minor, on January 5, 1876, for the N. W. ¼ of section 18, township 6 N., range 2 E. of the Humboldt meridian. The bill as originally filed made, in substance, the following allegations:

That said Minor, on the twenty-third day of October, 1874, filed the declaratory statement in the land office necessary to give him a right of pre-emption to the land, alleging that he had made a settlement on it March 20 of that year; and on June 20, 1875, he made the usual affidavit that he had so settled on the land in March of the previous year; that he had improved it, built a house on it, and continued to reside on it from the time of said settlement, and had cultivated about one acre of it. He also made affidavit, as the law required, that he had not so settled upon and improved the land with

any agreement or contract with any person by which the title he might acquire would inure to the benefit of the latter. He also made oath that he was not the owner of 320 acres of land in any state or territory in the United States. These affidavits being received by the register and receiver as true, he paid the money necessary to perfect his right, received of them the usual certificate, called a patent certificate, on which there was issued to him at the General Land Office in due time the patent which is now assailed.

The bill then charges that all these statements, made under oath before the land officers, were false and fraudulent; that defendant had never made the settlement nor cultivation nor improvements mentioned; that he had never resided on the land, but during all the time had lived and had his home in a village about 12 miles distant; and that he had not made these proofs of settlement to appropriate the land to his own use, but with intent to sell the same to some person unknown to the plaintiff. It is also charged that defendant produced, in corroboration of his own statement, the affidavit of a witness, one Joseph Ohuitt, who testified to the settlement, improvement, and residence of defendant, all of which was false and fraudulent. It is then alleged that by these false affidavits the land officers, supposing them to be true, were deceived and misled into allowing said pre-emption claim and issuing said patent, to the great injury of the United States. * * *

The circuit and district judges have certified a division of opinion on eight propositions of law, which they believe to arise out of this demurrer, as follows: (1) Whether the frauds and perjury alleged in the bill as the equitable grounds for vacating the patent in question are frauds extrinsic and collateral to the matter tried and determined in the land office upon which the patent issued, and constitute such frauds as entitle the complainant to relief in a court of equity. (2) Whether perjury and false testimony in a proceeding before the land office, such as alleged in the said amended bill, by means of which a patent to a portion of the public land is fraudulently and wrongfully secured, is such a fraud as will require a court of equity to vacate the patent on that ground alone. (3) Whether the decision and determination of the questions involved on false and perjured testimony, as set forth in the said amended bill, and the issue of a patent thereon, are not conclusive as against the United States on a bill filed to vacate the patent so issued. * * *

MILLER, J.[38] * * * The first three questions may be considered together. If an individual or a corporation had been induced to part with the title to land, or any other property, by such a fraud as that set out in this bill, there would seem to be no difficulty in recovering it back by appropriate judicial proceedings. If it was a sale and conveyance of land induced by fraudulent misrepresentation of facts which

[38] Only a portion of this case is printed.

had no existence, on which the grantor relied, and had a right to rely, and which were essential elements of the consideration, there would be no hesitation in a court of equity giving relief; and where the title remained in the possession of the fraudulent grantee, the court would surely annul the whole transaction, and require a reconveyance of the land to the grantor. The case presented to us by the bill is one of unmitigated fraud and imposition, consummated by means of representations on which alone the sale was made, every one of which was false. The law and the rules governing these pre-emption sales required in every instance the settlement and residence for a given time on the land, the actual cultivation of a part of it, and building a house on it. It required that the claimant should do this with a purpose of acquiring real ownership for himself and not for another, nor with a purpose to sell to another.

In the case as presented by this bill none of these things were done, though the land officers were made to believe they were done by the false representation of the defendant. It was a case where all the requirements of the law were set at naught, evaded, and defied by one stupendous falsehood, which included all the requirements on which the right to secure the land rested. There can be no question of the fraud, and its misleading effect on the officers of the government, and, in a transaction between individuals, it makes a clear case for relief.

Is there anything in the circumstance that these misrepresentations were supported by perjury, that the defendant made oath to his falsehoods, and procured a false affidavit of a witness to corroborate himself, which should deprive the injured party of relief? It would seem rather to add to the force of the reasons for such relief that fraud and falsehood were re-enforced by perjury.

Is there any reason to be found in the relation of the government to such a case as this, which will deprive it of the same right to relief as an individual would have? On the contrary, there are reasons why the government in this class of cases should not be held to the same diligence in guarding against fraud as a private owner of real estate. The government owns millions and millions of acres of land, which are by law open to pre-emption, homestead, and public and private sale. The right and the title to these lands are to be obtained from the government only in accordance with fixed rules of law. For the more convenient management of the sale of these lands, and the establishment by individuals of the inchoate rights of pre-emption and homestead, and their final perfection in the issuing of a title called a patent, there is established in each land district an office in which are two officers, and no more, called register and receiver. These districts often include 20,000 square miles or more, in all parts of which the lands of the government subject to sale, pre-emption, and homestead are found. These officers do not, they cannot, visit these lands. They have maps showing the location of the government lands, and their

subdivision into townships, sections, and parts of sections, and when a person desires to initiate a claim to any of them, he goes before them and makes the necessary statements, affidavits, and claims, of all which they make memoranda and copies, which are forwarded to the General Land Office at Washington.

For the truth of these statements they are compelled to rely on the oaths of the parties asserting claims, and such ex parte affidavits as they may produce. In nine cases out of ten, perhaps in a much larger percentage, the proceedings are wholly ex parte. In the absence of any contesting claimant for a right to purchase or secure the land, the party applying has it all his own way. He makes his own statement, sworn to before those officers, and he produces affidavits. If these affidavits meet the requirements of the law, the claimant succeeds, and what is required is so well known that it is reduced to a formula. It is not possible for the officers of the government, except in a few rare instances, to know anything of the truth or falsehood of these statements. In the cases where there is no contesting claimant there is no adversary proceeding whatever. The United States is passive; it opposes no resistance to the establishment of the claim, and makes no issue on the statement of the claimant.

When, therefore, he succeeds by misrepresentation, by fraudulent practices, aided by perjury, there would seem to be more reason why the United States, as the owner of land of which it has been defrauded by these means, should have remedy against that fraud—all the remedy which the courts can give—than in the case of a private owner of a few acres of land on whom a like fraud has been practiced.

In a suit brought by Moffat against the United States to set aside a patent for land on the ground of fraud in procuring its issue, this court said: "It may be admitted, as stated by counsel, that if, upon any state of facts, the patent might have been lawfully issued, the court will presume, as against collateral attack, that the facts existed; but that presumption has no place in a suit by the United States directly assailing the patent and seeking its cancellation for fraud in the conduct of those officers." 112 U. S. 24, 5 Sup. Ct. 10, 28 L. Ed. 623. The principle is equally applicable when those officers, though wholly innocent, were imposed upon and deceived by the fraud and false swearing of the party to whom the patent was issued.

The learned judge whose opinion prevailed in the Circuit Court and is found in the record, has been misled by confounding the present case with that of U. S. v. Throckmorton, 98 U. S. 61, 25 L. Ed. 93, and Vance v. Burbank, 101 U. S. 514, 25 L. Ed. 929, and thus applying principles to this which do not belong to it. In Throckmorton's Case, it is true, a part of the relief sought was to set aside a patent for land issued by the United States. But the patent was issued on the confirmation of a Mexican grant after proceedings prescribed by the act of Congress on that subject. These proceedings were judicial. They commenced before a board of commissioners. There were pleadings

and parties, and the claimant was plaintiff, and the United States was the defendant. Both parties were represented by counsel—the United States having in all such cases her regular district attorney to represent her. Witnesses were examined in the usual way, by depositions, subject to cross-examinations, and not by ex parte affidavits. From this tribunal there was a right of appeal to the district court, and from that court to the Supreme Court of the United States, by either party. There was nothing wanting to make such a proceeding, in the highest sense, a judicial one, and to give to its final judgment or decree all the respect, the verity, the conclusiveness, which belong to such a final decree between the parties. The patent could only issue on this final decree of confirmation of the Spanish or Mexican grant, and was, in effect, but the execution of that decree.

It was to such a case as this that the ruling in Throckmorton's Case was applied. The court said in that case, which was a bill to set aside the decree of confirmation: "The genuineness and validity of the concession from Michelterona, produced by complainant, was the single question pending before the board of commissioners and the district court for four years. It was the thing, and the only thing, that was controverted, and it was essential to the decree. To overrule the demurrer to this bill would be to retry, twenty years after the decision of those tribunals, the very matter which they tried, on the ground of fraud in the document on which the decree was made. If we can do this now, some other court may be called on twenty years hence to retry the same matter on another allegation of fraudulent combination in this suit to defeat the ends of justice; and so the number of suits would be without limit and litigation endless about the single question of the validity of this document."

It needs no other remarks than those we have already made, as to the nature of the proceeding before the land officers, to show how inappropriate this language is to such a proceeding. Here no one question was in issue. No issue at all was taken. No adversary proceeding was had. No contest was made. The officers, acting on such evidence as the claimant presented, were bound by it and by the law to issue a patent. They had no means of controverting its truth, and the government had no attorney to inquire into it. Surely the doctrine applicable to the conclusive character of the solemn judgments of courts, with full jurisdiction over the parties and the subject-matter, made after appearance, pleadings, and contest by parties on both sides, cannot be properly applied to the proceedings in the land office in such cases.

So, also, as regards the case of Vance v. Burbank, 101 U. S. 514, 25 L. Ed. 929, the language of the court in regard to the conclusiveness of the decision of the land office must be considered with reference to the case before it. That was not a case by the grantor, the United States, to set aside the patent, but by a party, or the heirs of a party, who had contested the right of the grantee before all the officers of

the land department up to the Secretary of the Interior, and been defeated, and where the whole question depended on disputed facts, the evidence of which was submitted by the contestants to those officers. In such a case, where there was full hearing, rehearing, and issues made and tried, the observation of the court, "that the decision of the proper officers of the department is in the nature of a judicial determination of the matter in dispute," is well founded.

It has been often said by this court that the land officers are a special tribunal of a quasi judicial character, and their decision on the facts before them is conclusive. And we are not now controverting the principle that where a contest between individuals, for the right to a patent for public lands, has been brought before these officers, and both parties have been represented and had a fair hearing, that those parties are concluded as to all the facts thus in issue by the decision of the officers. But in proceedings like the present, wholly ex parte, no contest, no adversary proceedings, no reason to suspect fraud, but where the patent is the result of nothing but fraud and perjury, it is enough to hold that it conveys the legal title, and it would be going quite too far to say that it cannot be assailed by a proceeding in equity and set aside as void, if the fraud is proved and there are no innocent holders for value. We have steadily held that, though in the absence of fraud the facts were concluded by the action of the land department, a misconstruction of the law, by which alone the successful party obtained a patent, might be corrected in equity; much more when there was fraud and imposition.

If, by the case as made by the bill, Spence's claim had covered all the land patented to Minor, it would present the question whether the United States could bring this suit for Spence's benefit. The government, in that case, would certainly have no interest in the land when recovered, as it must go to Spence without any further compensation. And it may become a grave question, in some future case of this character, how far the officers of the government can be permitted, when it has no interest in the property or in the subject of the litigation, to use its name to set aside its own patent, for which it has received full compensation, for the benefit of a rival claimant. The question, however, does not arise here, for half the land covered by the patent would revert to the United States if it was vacated; and, as between the United States and Minor it was one transaction evidenced by one muniment of title, the question does not arise; certainly not on demurrer to this bill.

The result of these considerations is that the first and second questions are answered in the affirmative; the third, fourth, sixth, and seventh in the negative; and the fifth is immaterial.

The decree of the Circuit Court is reversed, and the case remanded for further proceeding not inconsistent with this opinion.[39]

[39] Suit to cancel certificate of naturalization. U. S. v. Norsch (C. C.) 42 Fed. 417 (1890).

NOBLE et al. v. UNION RIVER LOGGING R. CO.

(Supreme Court of United States, 1893. 147 U. S. 165, 13 Sup. Ct. 271, 37 L. Ed. 123.)

Appeal from the Supreme Court of the District of Columbia. Affirmed.

This was a bill in equity by the Union River Logging Railroad Company to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from executing a certain order revoking the approval of the plaintiff's maps for a right of way over the public lands, and also from molesting plaintiff in the enjoyment of such right of way secured to it under an act of Congress.

The bill averred, in substance, that the Union River Logging Railroad Company was organized March 20, 1883, under chapter 185 of the Territorial Code of Washington, authorizing the formation of "corporations for * * * the purpose of building, equipping, and running railroads," etc. The articles declared the business and objects of the corporation to be "the building, equipping, running, maintaining, and operating of a railroad for the transportation of saw logs, piles, and other timber, and wood and lumber, and to charge and receive compensation and tolls therefor, * * * from tide water in Lynch's Cove, at the head of Hood's Canal, in said Mason county, and running thence in a general northeasterly direction, by the most practicable route, a distance of about ten miles, more or less," etc. The capital stock of the company being subscribed, the company proceeded by degrees to construct and equip a road extending from tide water in Lynch's Cove, about four miles along the line above mentioned, to transport saw logs and other lumber and timber. On August 17, 1888, amended articles of incorporation were filed, "to construct and equip a railroad and telegraph line" over a much longer route, with branches, and "to maintain and operate said railroad and branches, and carry freight and passengers, thereon, and receive tolls therefor." Also "to engage and carry on a general logging business, and provide for the cutting, hauling, transportation, buying, owning, acquiring, and selling of all kinds of logs, piles, poles, lumber, and timber."

In the spring of 1889, plaintiff proceeded to extend its line of road for three miles beyond the point to which it had previously extended it. It located at intervals a better line of road; made and ballasted a new roadbed of standard gauge; and substituted steel rails and another locomotive in place of those rails and equipments which had been sufficient for its limited purposes, as specified in the original articles. In January, 1889, the company desiring to avail itself of Act Cong. March 3, 1875, c. 152, 18 Stat. 482 (U. S. Comp. St. 1901, p. 1568), granting to railroads a right of way through the public lands of the United States, filed with the register of the land office at Seattle a

copy of its articles of incorporation, a copy of the territorial law under which the company was organized, and the other documents required by the act, together with a map showing the termini of the road, its length, and its route through the public lands according to the public surveys. These papers were transmitted to the Commissioner of the Land Office, and by him to the Secretary of the Interior, by whom they were approved in writing, and ordered to be filed. They were accordingly filed at once, and the plaintiff notified thereof.

On June 13, 1890, a copy of an order by the appellant, successor in office to the Secretary of the Interior by whom the maps were approved, was served upon the plaintiff, requiring it to show cause why said approval should not be revoked and annulled.

This was followed by an order of the acting Secretary of the Interior, annulling and canceling such maps, and directing the Commissioner of the Land Office to carry out the order.

The answer admitted all the allegations of fact in the bill, and averred that it became known to the defendants that the plaintiff was not engaged in the business of a common carrier of passengers and freight at the time of its application, but in the transportation of logs for the private use and benefit of the several persons composing the said company, and that, being advised that a railroad company carrying on a merely private business was not such a railroad company as was contemplated by the act of Congress, deemed it their duty to vacate and annul the action of Mr. Vilas, then Secretary of the Interior, approving plaintiff's maps of definite location, and to that end caused the notice complained of in the bill to be served. They further claimed it to be their duty to revoke and annul the action of the former Secretary of the Interior as having been made improvidently, and on false suggestions, and without authority under the statute.

Upon a hearing upon the bill, answer, and accompanying exhibits, the court ordered a decree for the plaintiff, and an injunction as prayed for in the bill. Defendants appealed to this court.

Mr. Justice BROWN, after stating the facts in the foregoing language, delivered the opinion of the court.

This case involves not only the power of this court to enjoin the head of a department, but the power of a Secretary of the Interior to annul the action of his predecessor, when such action operates to give effect to a grant of public lands to a railroad corporation.

1. With regard to the judicial power in cases of this kind, it was held by this court as early as 1803, in the great case of Marbury v. Madison, 1 Cranch, 137, that there was a distinction between acts involving the exercise of judgment or discretion and those which are purely ministerial; that, with respect to the former, there exists, and can exist, no power to control the executive discretion, however erroneous its exercise may seem to have been; but with respect to ministerial duties, an act or refusal to act is, or may become, the subject of review by the courts. The principle of this case was applied in

Kendall v. U. S., 12 Pet. 524, 9 L. Ed. 1181, and the action of the Circuit Court sustained in a proceeding where it had commanded the Postmaster General to credit the relator with a certain sum awarded to him by the Solicitor of the Treasury under an act of Congress authorizing the latter to adjust the claim, this being regarded as purely a ministerial duty. In Decatur v. Paulding, 14 Pet. 497, 10 L. Ed. 559, a mandamus was refused upon the same principle, to compel the Secretary of the Navy to allow to the widow of Commodore Decatur a certain pension and arrearages. Indeed, the reports of this court abound with authorities to the same effect. Kendall v. Stokes, 3 How. 87, 11 L. Ed. 506; Brashear v. Mason, 6 How. 92, 12 L. Ed. 357; Reeside v. Walker, 11 How. 272, 13 L. Ed. 693; Commissioner v. Whiteley, 4 Wall. 522, 18 L. Ed. 335; U. S. v. Seaman, 17 How. 231, 15 L. Ed. 226; U. S. v. Guthrie, 17 How. 284, 15 L. Ed. 102; U. S. v. Commissioner, 5 Wall. 563, 18 L. Ed. 892; Gaines v. Thompson, 7 Wall. 347, 19 L. Ed. 62; Secretary v. McGarrahan, 9 Wall. 298, 19 L. Ed. 579; U. S. v. Schurz, 102 U. S. 378, 26 L. Ed. 167; Butterworth v. Hoe, 112 U. S. 50, 5 Sup. Ct. 25, 28 L. Ed. 656; U. S. v. Black, 128 U. S. 40, 9 Sup. Ct. 12, 32 L. Ed. 354. In all these cases the distinction between judicial and ministerial acts is commented upon and enforced.

We have no doubt the principle of these decisions applies to a case wherein it is contended that the act of the head of a department, under any view that could be taken of the facts that were laid before him, was ultra vires, and beyond the scope of his authority. If he has no power at all to do the act complained of, he is as much subject to an injunction as he would be to a mandamus if he refused to do an act which the law plainly required him to do. As observed by Mr. Justice Bradley in Board v. McComb, 92 U. S. 531, 541, 23 L. Ed. 623: "But it has been well settled that when a plain, official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases the writs of mandamus and injunction are somewhat correlative to each other."

2. At the time the documents required by the act of 1875 were laid before Mr. Vilas, then Secretary of the Interior, it became his duty to examine them, and to determine, among other things, whether the railroad authorized by the articles of incorporation was such a one as was contemplated by the act of Congress. Upon being satisfied of this fact, and that all the other requirements of the act had been observed, he was authorized to approve the profile of the road, and to cause such approval to be noted upon the plats in the land office for the district where such land was located. When this was done, the granting sec-

tion of the act became operative, and vested in the railroad company a right of way through the public lands to the extent of 100 feet on each side of the central line of the road. Frasher v. O'Connor, 115 U. S. 102, 5 Sup. Ct. 1141, 29 L. Ed. 311.

The position of the defendants in this connection is that the existence of a railroad, with the duties and liabilities of a common carrier of freight and passengers, was a jurisdictional fact, without which the Secretary had no power to act, and that in this case he was imposed upon by the fraudulent representations of the plaintiff, and that it was competent for his successor to revoke the approval thus obtained; in other words, that the proceedings were a nullity, and that his want of jurisdiction to approve the map may be set up as a defense to this suit.

It is true that, in every proceeding of a judicial nature, there are one or more facts which are strictly jurisdictional, the existence of which is necessary to the validity of the proceedings, and without which the act of the court is a mere nullity; such, for example, as the service of process within the state upon the defendant in a common-law action (D'Arcy v. Ketchum, 11 How. 165, 13 L. Ed. 648; Webster v. Reid, 11 How. 437, 13 L. Ed. 761; Harris v. Hardeman, 14 How. 334, 14 L. Ed. 444; Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565; Borden v. Fitch, 15 Johns. [N. Y.] 141, 8 Am. Dec. 225); the seizure and possession of the res within the bailiwick in a proceeding in rem (Rose v. Himely, 4 Cranch, 241, 2 L. Ed. 608; Thompson v. Whitman, 18 Wall. 457, 21 L. Ed. 897); a publication in strict accordance with the statute, where the property of an absent defendant is sought to be charged (Galpin v. Page, 18 Wall. 350, 21 L. Ed. 959; Guaranty Trust & Safe Deposit Co. v. Green Cove Springs & M. R. Co., 139 U. S. 137, 11 Sup. Ct. 512, 35 L. Ed. 116). So, if the court appoint an administrator of the estate of a living person, or, in a case where there is an executor capable of acting (Griffith v. Frazier, 8 Cranch, 9, 3 L. Ed. 471), or condemns as lawful prize a vessel that was never captured (Rose v. Himely, 4 Cranch, 241, 269, 2 L. Ed. 608), or a court-martial proceeds and sentences a person not in the military or naval service (Wise v. Withers, 3 Cranch, 331, 2 L. Ed. 457), or the land department issues a patent for land which has already been reserved or granted to another person the act is not voidable merely, but void. In these and similar cases the action of the court or officer fails for want of jurisdiction over the person or subject-matter. The proceeding is a nullity, and its invalidity may be shown in a collateral proceeding.

There is, however, another class of facts which are termed "quasi jurisdictional," which are necessary to be alleged and proved in order to set the machinery of the law in motion, but which, when properly alleged, and established to the satisfaction of the court, cannot be attacked collaterally. With respect to these facts, the finding of the

court is as conclusively presumed to be correct as its finding with respect to any other matter in issue between the parties. Examples of these are the allegations and proof of the requisite diversity of citizenship, or the amount in controversy in a federal court, which, when found by such court, cannot be questioned collaterally (Des Moines Nav. & R. Co. v. Iowa Homestead Co., 123 U. S. 552, 8 Sup. Ct. 217, 31 L. Ed. 202; In re Sawyer, 124 U. S. 200, 220, 8 Sup. Ct. 482, 31 L. Ed. 402); the existence and amount of the debt of a petitioning debtor in an involuntary bankruptcy (Michaels v. Post, 21 Wall. 398, 22 L. Ed. 520; Betts v. Bagley, 12 Pick. [Mass.] 572); the fact that there is insufficient personal property to pay the debts of a decedent, when application is made to sell his real estate (Comstock v. Crawford, 3 Wall. 396, 7 L. Ed. 189); Grignon's Lessee v. Astor, 2 How. 319, 11 L. Ed. 283; Florentine v. Barton, 2 Wall. 210, 17 L. Ed. 783); the fact that one of the heirs of an estate had reached his majority, when the act provided that the estate should not be sold if all the heirs were minors (Thompson v. Tolmie, 2 Pet. 157); and others of a kindred nature, where the want of jurisdiction does not go to the subject-matter or the parties, but to a preliminary fact necessary to be proven to authorize the court to act. Other cases of this description are: Hudson v. Guestier, 6 Cranch, 281, 3 L. Ed. 224; Ex parte Watkins, 3 Pet. 193, 7 L. Ed. 650; U. S. v. De la Maza Arredondo, 6 Pet. 691, 709, 8 L. Ed. 547; Dyckman v. City of New York, 5 N. Y. 434; Jackson v. Crawfords, 12 Wend. (N. Y.) 533; Jackson v. Robinson, 4 Wend. (N. Y.) 436; Fisher v. Bassett, 9 Leigh (Va.) 119, 131, 33 Am. Dec. 227; Wright v. Douglass, 10 Barb. (N. Y.) 97, 111. In this class of cases, if the allegation be properly made, and the jurisdiction be found by the court, such finding is conclusive and binding in every collateral proceeding; and, even if the court be imposed upon by false testimony, its finding can only be impeached in a proceeding instituted directly for that purpose. Simms v. Slacum, 3 Cranch, 300, 2 L. Ed. 446.

This distinction has been taken in a large number of cases in this court, in which the validity of land patents has been attacked collaterally, and it has always been held that the existence of lands subject to be patented was the only necessary prerequisite to a valid patent. In the one class of cases it is held that, if the land attempted to be patented had been reserved, or was at the time no part of the public domain, the land department had no jurisdiction over it, and no power or authority to dispose of it. In such cases its action in certifying the lands under a railroad grant, or in issuing a patent, is not merely irregular, but absolutely void, and may be shown to be so in any collateral proceeding. Polk's Lessee v. Wendal, 9 Cranch, 87, 3 L. Ed. 665; Patterson v. Winn, 11 Wheat. 380, 6 L. Ed. 500; Jackson v. Lawton, 10 Johns. (N. Y.) 23, 6 Am. Dec. 311; Minter v. Crommelin, 18 How. 87, 15 L. Ed. 279; Reichart v. Felps, 6 Wall. 160, 18 L. Ed. 849; Railway Co. v. Dunmeyer, 113 U. S. 629, 5 Sup. Ct. 566,

28 L. Ed. 1122; U. S. v. Southern Pac. Ry. Co., 146 U. S. 570, 13 Sup. Ct. 152, 36 L. Ed. 1091.

Upon the other hand, if the patent be for lands which the land department had authority to convey, but it was imposed upon, or was induced by false representations to issue a patent, the finding of the department upon such facts cannot be collaterally impeached, and the patent can only be avoided by proceedings taken for that purpose. As was said in Smelting, etc., Co. v. Kemp, 104 U. S. 636, 640, 26 L. Ed. 875: "In that respect they [the officers of the land department] exercise a judicial function, and therefore it has been held in various instances by this court that their judgment as to matters of fact, properly determinable by them, is conclusive when brought to notice in a collateral proceeding. Their judgment in such cases is, like that of other special tribunals upon matters within their exclusive jurisdiction, unassailable, except by a direct proceeding for its correction or annulment." In French v. Fyan, 93 U. S. 169, 23 L. Ed. 812, it was held that the action of the Secretary of the Interior identifying swamp lands, making lists thereof, and issuing patents therefor, could not be impeached in an action at law by showing that the lands which the patent conveyed were not in fact swamp and overflowed lands, although his jurisdiction extended only to lands of that class. Other illustrations of this principle are found in Johnson v. Towsley, 13 Wall. 72, 20 L. Ed. 485; Moore v. Robbins, 96 U. S. 530, 24 L. Ed. 848; Steel v. Smelting, etc., Co., 106 U. S. 447, 1 Sup. Ct. 389, 27 L. Ed. 226; Quinby v. Conlan, 104 U. S. 420, 26 L. Ed. 800; Vance v. Burbank, 101 U. S. 514, 25 L. Ed. 929; Hoofnagle v. Anderson, 7 Wheat. 212, 5 L. Ed. 437; Ehrhardt v. Hogaboom, 115 U. S. 67, 5 Sup. Ct. 1157, 29 L. Ed. 346.

In Moore v. Robbins, 96 U. S. 530, 24 L. Ed. 848, it was said directly that it is a part of the daily business of officers of the land department to decide when a party has by purchase, by pre-emption, or by any other recognized mode, established a right to receive from the government a title to any part of the public domain. This decision is subject to an appeal to the Secretary of the Interior, if taken in time; "but, if no such appeal be taken, and the patent, issued under the seal of the United States and signed by the President, is delivered to and accepted by the party, the title of the government passes with this delivery. With the title passes away all the authority or control of the executive department over the land, and over the title which it has conveyed. * * * The functions of that department necessarily cease when the title has passed from the government."

We think the case under consideration falls within this latter class. The lands over which the right of way was granted were public lands, subject to the operation of the statute; and the question whether the plaintiff was entitled to the benefit of the grant was one which it was competent for the Secretary of the Interior to decide, and, when decided, and his approval was noted upon the plats, the first section

of the act vested the right of way in the railroad company. The language of that section is "that the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any state or territory," etc. The uniform rule of this court has been that such an act was a grant in præsenti of lands to be thereafter identified. Railway Co. v. Alling, 99 U. S. 463, 25 L. Ed. 438. The railroad company became at once vested with a right of property in these lands, of which they can only be deprived by a proceeding taken directly for that purpose.

If it were made to appear that the right of way had been obtained by fraud, a bill would doubtless lie by the United States for the cancellation and annulment of an approval thus obtained. Moffat v. U. S., 112 U. S. 24, 5 Sup. Ct. 10, 28 L. Ed. 623; U. S. v. Minor, 114 U. S. 233, 5 Sup. Ct. 836, 29 L. Ed. 110. A revocation of the approval of the Secretary of the Interior, however, by his successor in office, was an attempt to deprive the plaintiff of its property without due process of law, and was, therefore, void. As was said by Mr. Justice Grier in U. S. v. Stone, 2 Wall. 525, 535, 17 L. Ed. 765: "One officer of the land office is not competent to cancel or annul the act of his predecessor. That is a judicial act, and requires the judgment of a court." Moore v. Robbins, 96 U. S. 530, 24 L. Ed. 848.

The case of U. S. v. Schurz, 102 U. S. 378, 26 L. Ed. 167, is full authority for the position assumed by the plaintiff in the case at bar. In this case the relator had been adjudged to be entitled to 160 acres of the public lands; the patent had been regularly signed, sealed, countersigned, and recorded; and it was held that a mandamus to the Secretary of the Interior to deliver the patent to the relator should be granted. It was said in this case by Mr. Justice Miller: "Whenever this takes place [that is, when a patent is duly executed], the land has ceased to be the land of the government, or, to speak in technical language, title has passed from the government, and the power of these officers to deal with it has also passed away." [40]

It was not competent for the Secretary of the Interior thus to revoke the action of his predecessor, and the decree of the court below must therefore be affirmed.

[40] In the same case (United States v. Schurz, 102 U. S. 378, 401, 402, 26 L. Ed. 167 [1880]), the court says: "The whole question is one of disputed law and disputed facts. It was a question for the land officers to consider and decide before they determined to issue McBride's patent. It was within their jurisdiction to do so. If they decided erroneously, the patent may be voidable, but not absolutely void. The mode of avoiding it, if voidable, is not by arbitrarily withholding it, but by judicial proceedings to set it aside, or correct it if only partly wrong."

In Johnson v. Towsley, 13 Wall. 72, 20 L. Ed. 485 (1871), equitable relief was given where an error of law had been committed in issuing a land patent. As to mode of relief in such cases, see Silver v. Ladd, 7 Wall. 219, 228, 19 L. Ed. 138 (1868).

BELEY v. NAPHTALY.

(Supreme Court of United States, 1898. 169 U. S. 353, 18 Sup. Ct. 354, 42 L. Ed. 775.)

PECKHAM, J.[41] * * * 4. We are also of opinion that the rejection by the Secretary of the Interior of the first application made by the defendant in error for a patent, and the subsequent granting of a rehearing and the issuing of a patent thereafter by the Secretary, were all acts within the jurisdiction of that officer. The fact that a decision refusing the patent was made by one Secretary of the Interior, and, upon a rehearing, a decision granting the patent was made by another Secretary of the Interior, is not material in a case like this. It is not a personal, but an official, hearing and decision, and it is made by the Secretary of the Interior as such Secretary, and not by an individual who happens at the time to fill that office, and the application for a rehearing may be made to the successor in office of the person who made the original decision, provided it could have been made to the latter had he remained in office. The Secretary who made the first decision herein could have granted a rehearing and reversed his former ruling.

The case of U. S. v. Stone, 2 Wall. 525, 17 L. Ed. 765, has no bearing adverse to this proposition. In that case it was stated that a patent is but evidence of a grant, and the officer who issues it acts ministerially, and not judicially; that, if he issues a patent for land reserved from sale by law, such patent is void for want of authority, but that one officer of the land office is not competent to cancel or annul the act of his predecessor; that is a judicial act, and requires the judgment of a court. The power to cancel or annul in that case meant the power to annul a patent issued by a predecessor, and this court held no such power existed. The officer originally issuing it would have had no greater power to annul the patent than had his successor.

Neither does Noble v. Railroad Co., 147 U. S. 165, 13 Sup. Ct. 271, 37 L. Ed. 123, touch the case. The principle therein decided was in substance the same as in the Stone Case, supra. The control of the department necessarily ceased the moment the title passed from the government. It was not a question whether a successor was able to do the act which the original officer might have done, but it was the announcement of the principle that no officer, after the title had actually passed, had any power over the matter whatever. After the Secretary of the Interior had approved the map as provided for in the act of Congress under which the proceedings were taken by the company, the first section of that act vested the right of way in the company. This was equivalent to a patent, and no revocation could thereafter be permitted. See, also, Lumber Co.

[41] Only a portion of the opinion of Peckham, J., is here printed.

v. Rust, 168 U. S. 589, at page 592, 18 Sup. Ct. 208, 42 L. Ed. 591.

We have considered the other questions raised herein, but do not think any error was committed in their disposition by the courts below. The judgment of the Circuit Court of Appeals must be affirmed.

Mr. Justice HARLAN dissented.

UNITED STATES ex rel. RIVERSIDE OIL CO. v. HITCHCOCK.

(Supreme Court of United States, 1903. 190 U. S. 316, 23 Sup. Ct. 698, 47 L. Ed. 1074.)

In error to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of that District denying a petition for a writ of mandamus to compel the Secretary of the Interior to vacate an order rejecting a selection of public land. Affirmed.

[The statement of facts is here omitted.]

Mr. Justice PECKHAM delivered the opinion of the court.

We have set out in the statement of facts, at very great length, a large portion of the contents of the petition and answer in this case. It has been done for the purpose of showing by the record itself the questions of law arising therefrom. Upon a perusal of the record it appears that those questions are not merely formal ones, nor are they so plain as not to require the careful judgment of any tribunal to which they may be referred for decision. Their solution was properly submitted to the Land Department, which had full and complete jurisdiction over the matters arising under Act June 4, 1897, c. 2, 30 Stat. 34 (U. S. Comp. St. 1901, p. 1538), and it thereby became the duty of the officers of that department to decide them. As is said in Knight v. United Land Ass'n, 142 U. S. 161, 12 Sup. Ct. Rep. 258, 35 L. Ed. 974: "The Secretary is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted or is disposed of to a party not entitled to it. He represents the government, which is a party in interest in every case involving the surveying and disposal of the public lands."

Congress has constituted the Land Department, under the supervision and control of the Secretary of the Interior, a special tribunal with judicial functions, to which is confided the execution of the laws which regulate the purchase, selling, and care and disposition of the public lands. Neither an injunction nor mandamus will lie against an officer of the Land Department to control him in discharging an official duty which requires the exercise of his judgment and discretion. Marquez v. Frisbie, 101 U. S. 473, 25 L. Ed. 800; Gaines

v. Thompson, 7 Wall. 347, 19 L. Ed. 62; United States ex rel. Dunlap v. Black, 128 U. S. 40, 32 L. Ed. 354, 9 Sup. Ct. Rep. 12; United States ex rel. Redfield v. Windom, 137 U. S. 636, 11 Sup. Ct. 197, 34 L. Ed. 811.

In Decatur v. Paulding, 14 Pet. 497, 10 L. Ed. 559, 600, it was held that, in general, the official duties of the head of one of the executive departments, whether imposed by act of Congress or by resolution, are not mere ministerial duties. The head of an executive department of the government in the administration of the various and important concerns of his office is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolutions of Congress under which he is from time to time required to act.

That the decision of the questions presented to the Secretary of the Interior was no merely formal or ministerial act is shown beyond the necessity of argument by a perusal of the foregoing statement of the issues presented by this record for the decision of the Secretary. Whether he decided right or wrong, is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction. The court has no general supervisory power over the officers of the Land Department, by which to control their decisions upon questions within their jurisdiction. If this writ were granted we would require the Secretary of the Interior to repudiate and disaffirm a decision which he regarded it his duty to make in the exercise of that judgment which is reposed in him by law, and we should require him to come to a determination upon the issues involved directly opposite to that which he had reached, and which the law conferred upon him the jurisdiction to make.

Mandamus has never been regarded as the proper writ to control the judgment and discretion of an officer as to the decision of a matter which the law gave him the power and imposed upon him the duty to decide for himself. The writ never can be used as a substitute for a writ of error. Nor does the fact that no writ of error will lie in such a case as this, by which to review the judgment of the Secretary, furnish any foundation for the claim that mandamus may therefore be awarded. The responsibility as well as the power rests with the Secretary, uncontrolled by the courts.

Neither the case of Roberts v. United States, 176 U. S. 221, 20 Sup. Ct. 376, 44 L. Ed. 443, nor that of American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 23 Sup. Ct. 33, 47 L. Ed. 90, decides anything opposing these views.

In the Roberts Case it was simply decided that the duty of the Treasurer to pay the money in question in that case was ministerial in its nature, and should have been performed by him on demand,

and that, therefore, mandamus was the proper remedy for his failure to do it.

In the McAnnulty Case it was held that the order of the Postmaster General to the postmaster in the city of Nevada, not to deliver the mail to the relator, was not a justification for such refusal, because the order was given without authority of law, and the postmaster could, notwithstanding such order, be compelled by mandamus to do his duty and deliver the mail. The case has no relevancy to the one in hand.

We are so clearly of opinion that the decision of the defendant in this case was judicial in its nature that further argument upon the subject is needless.

The judgment of the Court of Appeals of the District of Columbia is affirmed.[42]

SECTION 81.—PENSIONS

UNITED STATES ex rel. DUNLAP v. BLACK, Commissioner of Pensions. (No. 991.) SAME ex rel. ROSE v. SAME. (No. 992.) SAME ex rel. MILLER v. SAME. (No. 993.)

(Supreme Court of United States, 1888. 128 U. S. 40, 9 Sup. Ct. 12, 32 L. Ed. 354.)

Errors to the Supreme Court of the District of Columbia.

BRADLEY, J. These cases were argued together, but it will be convenient to consider them separately, in the order in which they stand on the docket.

No. 991 was an application by Oscar Dunlap, the relator, to the Supreme Court of the District of Columbia, for a writ of mandamus to be directed to the respondent, Black, as Commissioner of Pensions, commanding him to reissue to the relator his pension certificate for $25 per month from June 6, 1866; $31.25 per month from June 4, 1872; $50 per month from June 4, 1874; and $72 per month from June 17, 1878—first deducting all sums paid relator under previous pensions.

By Act March 3, 1873, c. 234, § 4, 17 Stat. 569 (Rev. St. § 4698 [U. S. Comp. St. 1901, p. 3235]), it was provided that a pension of $31.25 per month should be allowed to all persons who, while in the

[42] See, also, United States v. Jones, 131 U. S. 1, 9 Sup. Ct. 669, 33 L. Ed. 90 (1888), ante, p. 382.

Jurisdictional error in audit and allowance of claims, see Board of Supervisors of Richmond Co. v. Ellis, 59 N. Y. 620 (1875), and Dillon, Municipal Corporations, § 504.

military or naval service, had lost their sight, or both hands or both feet, or had been permanently and totally disabled, so as to require the regular aid and attendance of another person; and a pension of $24 per month to those who had lost one hand and one foot; and $18 per month to those who had lost either one hand or one foot; and other less pensions for lesser injuries—any increase of pension to commence from the date of the examining surgeon's certificate. By Act June 18, 1874, c. 298, 18 Stat. 78 (Supp. Rev. St. 39 [U. S. Comp. St. 1901, p. 3236]), it was provided that, in cases of blindness or loss of both hands or both feet, or total helplessness, requiring the regular and personal aid of another person, the pension should be increased from $31.25 to $50 per month. By Act Feb. 28, 1877, c. 73, 19 Stat. 264 (Supp. Rev. St. 282 [U. S. Comp. St. 1901, p. 3236]), it was provided that those who had lost one hand and one foot should be entitled to a pension for each of such disabilities at the rate of existing laws, which made the total pension $36 per month. The relator, in April, 1877, applied for the benefit of this law, and it was granted to him. By Act June 16, 1880, c. 236, 21 Stat. 281 (Supp. Rev. St. 560 [U. S. Comp. St. 1901, p. 3237]), it was enacted that all those then (at the date of the act) receiving a pension of $50 per month under the act of June 18, 1874, should receive $72 per month from June 17, 1878.

After the last act was passed, the relator applied for the increase allowed by it. The Commissioner of Pensions, being of opinion that he did not come within its terms, rejected the application, but granted him a certificate for a pension of $50 per month under the act of 1874, to be received from May 25, 1881, the date of his medical examination. The petition for mandamus sets out the decision of the Commissioner in full, in which it is conceded that the relator has become permanently disabled. The following is an extract from the decision, to-wit:

"Washington, D. C., October 15, 1887.

"In this case the application of the claimant for rerating and for increase will be allowed at $50 per month from May 25, 1881, the date of the first medical examination under the claimant's application of June 26, 1880. This rating is allowed under the act of June 18, 1874; it sufficiently appearing by the evidence in this case that the claimant has lost both a hand and a foot, and at the same time has been so additionally injured in the head as, from a period prior to the rerating or increase in this case, to render him totally and permanently helpless, requiring from thence until now the regular personal aid and attendance of another person. The reason why the claimant's rating is not advanced to $72 per month is that he was not on the 16th of June, 1880 [the date of the act] receiving pension at the rate of $50 per month, nor was he entitled to receive a pension of $50 per month at that date, for the reason that, while the degree of helplessness which has been shown was that contemplated by the

law, the claimant himself (neither on his own motion, nor under the guidance of those who are legally responsible for his actions in this claim) had not made application to be rated in pursuance of the act of June 18, 1874, but, on the contrary thereof, had asked to be rated and had been rated at $36 per month, under the act of February 28, 1877."

The decision proceeds to discuss further the reasons for the conclusion to which the commissioner had come.

The relator, by his counsel, strenuously contends that the concession made by the commissioner with regard to the disability of the relator shows that it was his clear duty to have granted a certificate for the larger pension of $72 per month. The following passage in the petition for mandamus shows the position taken by the relator: "And your relator further says that the respondent has thus expressly found the facts in your relator's case to be (1) that while your relator was in the military service * * * he sustained such wounds and injuries as resulted in the loss of his right hand and right foot, and at the same time sustaining injury to the head; (2) that your relator was thereby rendered 'totally and permanently helpless, requiring from thence till now the regular aid and attendance of another person'; and (3) that your relator applied to the Commissioner of Pensions on June 26, 1880, for pension on account thereof. And your relator says that upon this finding of the facts whether he is entitled to a rerating and an increase of pension from date of discharge, so as to give unto him a pension commensurate with his disabilities so found to exist by the respondent, is a question of law; and that it does not lie in the discretionary power of the respondent, as Commissioner of Pensions, to deny or in any wise abridge his rights with respect thereto."

This extract shows the theory of the petitioner, and the doctrine which he invokes in support of his application. We have been more full in stating the facts of the case in order that the legal grounds on which that application is based may clearly appear. The case does not require an extended discussion. The questions of law on which it depends have been closed by repeated decisions of this court.

The amenability of an executive officer to the writ of mandamus, to compel him to perform a duty required of him by law, was discussed by Chief Justice Marshall in his great opinion in the case of Marbury v. Madison, 1 Cranch, 137, 2 L. Ed. 60; and the radical distinction was there pointed out between acts performed by such officers in the exercise of their executive functions, which the Chief Justice calls political acts, and those of a mere ministerial character; and the rule was distinctly laid down that the writ will not be issued in the former class of cases, but will be issued in the latter. In that case President Adams had nominated, and the Senate had confirmed, Marbury as a justice of the peace of the District of Columbia; and a commission in due form was signed by the President ap-

pointing him such justice, and the seal of the United States was duly affixed thereto by the Secretary of State; but the commission had not been handed to Marbury when the offices of the government were transferred to the administration of President Jefferson. Mr. Madison, the new Secretary of State, refused to deliver the commission, and a mandamus was applied for to this court to compel him to do so. The court held that the appointment had been made and completed, and that Marbury was entitled to his commission, and that the delivery of it to him was a mere ministerial act, which involved no further official discretion on the part of the Secretary, and could be enforced by mandamus. But the court did not issue the writ, because it would have been an exercise of original jurisdiction which it did not possess.

While this opinion will always be read by the student with interest and profit, it has not been considered as invested with absolute judicial authority, except on the question of the original jurisdiction of this court. The decision on this point has made it necessary for parties desiring to compel an officer of the government to perform an act in which they are interested to resort to the highest court of the District of Columbia for redress. It has been held in numerous cases, and was held after special discussion in the cases of Kendall v. U. S., 12 Pet. 524, 9 L. Ed. 1181, and U. S. v. Schurz, 102 U. S. 378, 26 L. Ed. 167, that the former Circuit Court of the District, and the present Supreme Court of the District, respectively, were invested with plenary jurisdiction on the subject. On this point there is no further question.

The two leading cases which authoritatively show when the Supreme Court of the District may, and when it may not, grant a mandamus against an executive officer, are the above-cited case of Kendall v. U. S., 12 Pet. 524, 9 L. Ed. 1181,[43] and Decatur v. Paulding, 14 Pet. 497, 10 L. Ed. 359.[44] The subsequent cases have followed the principles laid down in these, and do little more than illustrate and apply them.

In the former case the mandamus was granted, and the decision was affirmed by this court. The case was shortly this: Stockton & Stokes, as contractors for carrying the mails, had certain claims against the government for extra services, which they insisted should be credited in their accounts, and a controversy arose between them and the Post-Office Department on the subject. Congress passed an act for their relief, by which the Solicitor of the Treasury was authorized and directed to settle and adjust their claims, and make them such allowances as upon a full examination of all the evidence might seem to be equitable and right; and the Postmaster General was directed to credit them with whatever sums the Solicitor should decide to be due them. The Solicitor, after due investigation, made his report,

[43] See ante, p. 454.

[44] See ante, p. 438.

and stated the sums due to Stockton & Stokes on the claims made by them; but the Postmaster General, Mr. Kendall, refused to give them credit as directed by the law. This the court held he could be compelled to do by mandamus, because it was simply a ministerial duty to be performed, and not an official act requiring any exercise of judgment or discretion. This court, through Mr. Justice Thompson, said: "The act required by the law to be done by the Postmaster General is simply to credit the relators with the full amount of the award of the Solicitor. This is a precise, definite act, purely ministerial, and about which the Postmaster General had no discretion whatever. The law upon its face shows the existence of accounts between the relators and the Post-Office Department. No money was required to be paid, and none could be drawn from the treasury without further legislative provision, if this credit should overbalance the debit standing against the relators. But this was a matter with which the Postmaster General had no concern. He was not called upon to furnish the means of paying such balance, if any should be found. He was simply required to give the credit. This was not an official act in any other sense than being a transaction in the department where the books and accounts were kept; and was an official act in the same sense that an entry in the minutes of a court, pursuant to an order of the court, is an official act. There is no room for the exercise of any discretion, official or otherwise; all that is shut out by the direct and positive command of the law, and the act required to be done is, in every just sense, a mere ministerial act."

In the other case (Decatur v. Paulding) the mandamus was refused by the Circuit Court, and that decision was also affirmed by this court. The case was this: On the 3d of March, 1837, Congress passed an act giving to the widow of any officer who had died in the naval service a pension equal to half of his monthly pay from the time of his death until her death or marriage. On the same day Congress passed a resolution granting a pension to Mrs. Decatur, widow of Stephen Decatur, for five years, commencing June 30, 1834, and the arrearages of the half pay of a post captain from Commodore Decatur's death to the 30th of June, 1834. Mrs. Decatur applied for and received her pension under the general law, with a reservation of her rights under the resolution, claiming the pension granted by that also. The Secretary of the Navy, acting under the opinion of the Attorney General, decided that she could not have both. Thereupon she applied for a mandamus to compel the Secretary to comply with the resolution in her favor. Chief Justice Taney delivered the opinion of the court, and laid down the law in terms that have never been departed from. We can only quote a single passage from this opinion.

The Chief Justice says: "The duty required by the resolution was to be performed by him [the Secretary of the Navy] as the head of

one of the executive departments of the government, in the ordinary discharge of his official duties. In general, such duties, whether imposed by act of Congress or by resolution, are not mere ministerial duties. The head of an executive department of the government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolutions of Congress, under which he is from time to time required to act. If he doubts, he has a right to call on the Attorney General to assist him with his counsel; and it would be difficult to imagine why a legal adviser was provided by law for the heads of the departments, as well as for the President, unless their duties were regarded as executive, in which judgment and discretion were to be exercised. If a suit should come before this court which involved the construction of any of these laws, the court certainly would not be bound to adopt the construction given by the head of a department; and, if they supposed his decision to be wrong, they would, of course, so pronounce their judgment. But their judgment upon the construction of a law must be given in a case in which they have jurisdiction, and in which it is their duty to interpret the act of Congress, in order to ascertain the rights of the parties in the cause before them. The court could not entertain an appeal from the decision of one of the Secretaries, nor revise his judgment, in any case where the law authorized him to exercise discretion or judgment. Nor can it by mandamus act directly upon the officer, and guide and control his judgment or discretion in the matters committed to his care, in the ordinary discharge of his official duties. The case before us illustrates these principles, and shows the difference between executive and ministerial acts."

The Chief Justice then goes on to show that the decision of the Secretary of the Navy in that case was entirely executive and official in its character, and that in this respect the case differed entirely from that of Kendall v. U. S.

The principle of law deducible from these two cases is not difficult to enounce. The court will not interfere by mandamus with the executive officers of the government in the exercise of their ordinary official duties, even where those duties require an interpretation of the law, the court having no appellate power for that purpose; but when they refuse to act in a case at all, or when, by special statute or otherwise, a mere ministerial duty is imposed upon them—that is, a service which they are bound to perform without further question—then, if they refuse, a mandamus may be issued to compel them. Judged by this rule, the present case presents no difficulty. The Commissioner of Pensions did not refuse to act or decide. He did act and decide. He adopted an interpretation of the law adverse to the relator, and his decision was confirmed by the Secretary of the Interior, as evidenced by his signature of the certificate. Whether,

if the law were properly before us for consideration, we should be of the same opinion, or of a different opinion, is of no consequence in the decision of this case. We have no appellate power over the Commissioner, and no right to review his decision. That decision, and his action taken thereon, were made and done in the exercise of his official functions. They were by no means merely ministerial acts.

The decisions of this court, which have been rendered since the cases referred to, corroborate and confirm all that has been said. The following are the most important, to wit: Brashear v. Mason, 6 How. 92, 12 L. Ed. 357; U. S. v. Guthrie, 17 How. 284, 15 L. Ed. 102; Commissioner v. Whiteley, 4 Wall. 522, 18 L. Ed. 335; Georgia v. Stanton, 6 Wall. 50, 18 L. Ed. 721; Gaines v. Thompson, 7 Wall. 347, 19 L. Ed. 62; U. S. v. Schurz, 102 U. S. 378, 26 L. Ed. 167; Butterworth v. Hoe, 112 U. S. 50, 5 Sup. Ct. 25, 28 L. Ed. 656. In the two last cases cited, the mandamus was granted; and they were cases in which it was held that a mere ministerial duty was to be performed by the officer.

In U. S. v. Schurz the question related to a patent for land claimed by a pre-emptor. All the proceedings had been gone through, the right of the applicant had been affirmed, the patent had been made out in the land office, signed by the President, sealed with the land office seal, countersigned by the recorder of the land office, recorded in the proper book, and transmitted to the local land officers for delivery; but delivery was refused because instructions had been received from the Commissioner to return the patent. The plea was that it had been discovered that the lands belonged to a town site. The court held that this was an insufficient plea; that the title had passed to the applicant, and he was entitled to his patent, subject to any equity which other parties might have to the land, or to a proceeding for setting the patent aside; and that the duty of the Commissioner or Secretary of the Interior had become a mere ministerial duty to deliver the instrument, as was held in Marbury v. Madison, in relation to the commission of Marbury as justice of the peace. Of course, this case is entirely different from the case now under consideration.

The case of Butterworth v. Hoe was very similar in principle to that of U. S. v. Schurz. The Commissioner of Patents had decided in favor of the right of one Gill, an applicant for a patent, in a case of interference, and adjudged that a patent should issue to his assigns accordingly. An appeal was taken to the Secretary of the Interior, who reversed the decision of the Commissioner. The latter thereupon, and for that reason, refused to issue a patent. It was a question whether an appeal lay to the Secretary of the Interior, and this court held that it did not, and that he had no jurisdiction in the matter. The court, therefore, held that the patent ought to be issued in accordance with the decision of the Commissioner, and that

the mere issue of the patent was a ministerial matter for which a mandamus would lie. This case, like that of U. S. v. Schurz, is unlike the present. All deliberation had ceased; the right of Gill, the applicant, was adjudged; there was nothing to be done but to deliver to the party the documentary evidence of his title. That was a mere ministerial matter. We think that the mandamus was properly refused, and the judgment of the Supreme Court of the District is affirmed.

No. 992 is similar in all essential respects to the preceding, and the decision must be the same. Judgment affirmed.

No. 993 differs materially from Nos. 991 and 992. Charles R. Miller, the relator, having made an unsuccessful application to the Commissioner of Pensions for an increase of his pension, finally appealed to the Secretary of the Interior, and in his petition for mandamus says as follows, to wit:

"That the Secretary, upon a personal, careful inspection of the record, and all the evidence filed therein in his case, and on due consideration thereof, made and rendered the following official decision: 'Department of the Interior, Washington, D. C., February 12, 1885. The Commissioner of Pensions—Sir: Herewith are returned the papers in the pension claim (certificate No. 55,356) of Charles R. Miller. It appears from the papers that Mr. Miller's claim was before this department on the 6th inst., and it was held that the pensioner is greatly disabled, and it is evident from the papers in his case that he is utterly unable to do any manual labor, and he is therefore entitled to $30 per month under the act of March 3, 1883, which has been allowed him by your office. Since the departmental decision above referred to, the papers in the claim have been carefully reconsidered by the department, and a personal examination of the pensioner made; and it satisfactorily appears that he is unable to put on his shoe and stocking on the foot of his injured leg, for the reason that the nearest point that can be reached by hand from foot is 23 inches, and for the further reason that from "necrosis of the lower vertebræ of spine, producing anchylosis of the spinal column and destruction of some of the spinal nerves," he is unable to bend his back. After a careful review of all the facts in this case, the department is constrained to think that the pensioner comes under the meaning of the laws granting pensions to those persons who require aid and attendance. The decision of the 6th inst. is therefore overruled. Very respectfully, H. M. Teller, Secretary.'

"And your orator avers that the said official decision of the Secretary of the Interior, so made as aforesaid, was a final adjudication of his claim in his favor, and conclusively establishes his right under the laws to be rerated at $25 per month from June 6, 1866; $31.25 per month from June 4, 1872; $50 per month from June 4, 1874; and $72 per month from June 17, 1878—and to be paid the difference monthly between these sums and what has been allowed him; and

all that remained for the Commissioner of Pensions to do in the premises was the simple ministerial duty of accordingly carrying the said final official decision of the Secretary into execution."

The petition goes on to state that the former Commissioner of Pensions refused to carry out the Secretary's decision to its full extent, and that the present Commissioner, the respondent, still refuses. If, as the petition suggests, the Commissioner of Pensions refuses to carry out the decision of his superior officer, there would seem to be prima facie ground for at least calling upon him to show cause why a mandamus should not issue. This was all that the petitioner asked, and this the court refused.

As a general rule, when a superior tribunal has rendered a decision binding on an inferior, it becomes the ministerial duty of the latter to obey it and carry it out. So far as respects the matter decided, there is no discretion or exercise of judgment left. This is the constant course in courts of justice. The appellate court will not hesitate to issue a mandamus to compel obedience to its decisions. The appellate tribunal in the present case is the Secretary of the Interior, who has no power to enforce his decisions by mandamus, or any process of like nature; and therefore a resort to a judicial tribunal would seem to be necessary, in order to afford a remedy to the party injured by the refusal of the Commissioner to carry out his decision.

But it is suggested that removal of the contumacious subordinate from office, or a civil suit brought against him for damages, would be effectual remedies. We do not concur in this view. A suit for damages, if it could be maintained, would be an uncertain, tedious, and ineffective remedy, attended with many contingencies, and burdened with onerous expenses. Removal from office would be still more unsatisfactory. It would depend on the arbitrary discretion of the President, or other appointing power, and is not such a remedy as a citizen of the United States is entitled to demand. We think that the case suggested by the petition is one in which it would be proper for the court to interfere by mandamus. Whether it will turn out to be such, when all the circumstances are known, can be ascertained by a rule to show cause; and such a rule, we think, ought to have been granted.

The judgment of the court below is therefore reversed, and the cause remanded, with instructions to grant a rule to show cause as applied for by the petitioner.

Judgments will be entered separately in the several cases.

SECTION 82.—POSTAL ADMINISTRATION

AMERICAN SCHOOL OF MAGNETIC HEALING v. McANNULTY.

(Supreme Court of United States, 1902. 187 U. S. 94, 23 Sup. Ct. 33, 47 L. Ed. 90.)

Appeal from the Circuit Court of the United States for the Western District of Missouri to review a decree dismissing a bill to enjoin a postmaster from carrying out an order of the Postmaster General directing the retention of letters addressed to a corporation. Reversed.

The order complained of was as follows:

"Postoffice Department,
"Washington, D. C., May 15, 1900.

"It having been made to appear to the Postmaster General, upon evidence satisfactory to him, that the American School of Magnetic Healing, S. A. Weltmer, president, J. H. Kelly, secretary, and J. A. Kelly, at Nevada, Missouri, are engaged in conducting a scheme or device for obtaining money through the mails by means of false and fraudulent pretenses, representations, and promises, in violation of the act of Congress entitled 'An act to amend certain sections of the Revised Statutes relating to lotteries and for other purposes, approved September 19, 1900.'

"Now, therefore, by authority vested in him by said act and by the act of Congress entitled 'An act for the suppression of lottery traffic through international and interstate commerce and the postal service, subject to the jurisdiction and laws of the United States, approved March 2, 1895,' the Postmaster General hereby forbids you to pay any postal money order drawn to the order of said concern and persons, and you are hereby directed to inform the remitter of any such postal money order that payment thereof has been forbidden, and that the amount thereof will be returned upon the presentation of a duplicate money order, applied for and obtained under the regulations of the department.

"And you are hereby instructed to return all letters, whether registered or not, and other mail matter which shall arrive at your office directed to the said concern and persons, to the postmasters at the offices at which they were originally mailed, to be delivered to the senders thereof, with the word 'fraudulent' plainly written or stamped upon the outside of such letters or matter. Provided, however, that where there is nothing to indicate who are the senders of letters not registered, or other matter, you are directed in that case to send

such letters and matter to the dead-letter office, with the word 'fraudulent' plainly written or stamped thereon, to be disposed of as other dead matter, under the laws and regulations applicable thereto.

"Ch. Emory Smith, Postmaster General.

"To the Postmaster, Nevada, Missouri."

Section 3929 of the Revised Statutes (U. S. Comp. St. 1901, p. 2686) provides as follows: "Sec. 3929. The Postmaster General may, upon evidence satisfactory to him that any person is engaged in conducting any fraudulent lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property, by lot, chance, or drawing of any kind, or in conducting any other scheme or device for obtaining money through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any post offices at which registered letters arrive directed to any such person to return all such registered letters to the postmasters at the offices of which they were originally mailed, with the word 'fraudulent' plainly written or stamped upon the outside of such letters; and all such letters so returned to such postmasters shall be by them returned to the writers thereof, under such regulations as the Postmaster General may prescribe. But nothing contained in this title shall be so construed as to authorize any postmaster or other person to open any letter not addressed to himself."

Section 4041 (U. S. Comp. St. 1901, p. 2749) is of the same purport as section 3929, excepting that instead of providing for the retention of registered letters, it forbids the payment by any postmaster to the person or company described of any postal money orders drawn to his or its order, or to his or its favor, or to any agent of any such person or company, and it provides for the return to the remitters of the sums of money named in those money orders. Section 4 of the act (Act March 2, 1895, c. 191, 28 Stat. 693, 694 [U. S. Comp. St. 1901, p. 2688]) amended section 3929 of the Revised Statutes so as to provide for the retention of all letters instead of merely registered letters as in the original section.

Before the issuing of the written order by the Postmaster General prohibiting the delivery of mail matter to the complainants, and pursuant to notice from the Postmaster General, the complainants went before that official at Washington and had a hearing before him, and gave their reasons why what is termed a "fraud order" should not be issued, and the Postmaster General, after hearing evidence such as in his judgment was contemplated by the sections of the statutes above mentioned, issued the order above referred to, and thereupon the defendant has refused to permit the delivery of the mail, and assigns as his only reason for so doing that it would be in violation of the order of the Postmaster General, founded upon the provisions of the statute already set forth.

The complainants asked for an injunction to restrain the postmaster from carrying out the order of the Postmaster General, and that a

decree might be entered perpetually enjoining the defendant as prayed for.

The defendant demurred to the complainants' amended bill (1) on the ground that the complainants had not stated any such case as entitled them to any relief; (2) because the complainants had not stated any ground for equitable relief against the defendant, and had not shown any reason why an injunction should be granted.

The court sustained the demurrer, and, the complainants declining to plead further, it was decreed by the court that the amended bill of the complainants was insufficient in law and equity, and it was thereupon dismissed at complainants' cost.

The case arising upon demurrer, it was admitted that the business of the complainants was founded "almost exclusively on the physical and practical proposition that the mind of the human race is largely responsible for its ills, and is a perceptible factor in the treating, curing, benefiting, and remedying thereof, and that the human race does possess the innate power, through proper exercise of the faculty of the brain and mind, to largely control and remedy the ills that humanity is heir to, and (complainants) discard and eliminate from their treatment what is commonly known as Divine Healing and Christian Science, and they are confined to practical scientific treatment, emanating from the source aforesaid."

Mr. Justice PECKHAM delivered the opinion of the court.[45]

The bill of the complainants as amended raises some grave questions of constitutional law which, in the view the court takes of the case, it is unnecessary to decide. We may assume, without deciding or expressing any opinion thereon, the constitutionality in all particulars of the statutes above referred to, and therefore the questions arising in the case will be limited (1) to the inquiry as to whether the action of the Postmaster General under the circumstances set forth in the complainants' bill is justified by the statutes; and (2), if not, whether the complainants have any remedy in the courts. * * *

Second. Conceding, for the purpose of this case, that Congress has full and absolute jurisdiction over the mails, and that it may provide who may and who may not use them, and that its action is not subject to review by the courts, and also conceding the conclusive character of the determination by the Postmaster General of any material and relevant questions of fact arising in the administration of the statutes of Congress relating to his department, the question still remains as to the power of the court to grant relief where the Postmaster General has assumed and exercised jurisdiction in a case not covered by the statutes, and where he has ordered the detention of mail matter, when the statutes have not granted him power so to order. Has Congress intrusted the administration of these statutes wholly to the discretion of the Postmaster General, and to such an

[45] Only a portion of this case is printed.

extent that his determination is conclusive upon all questions arising under those statutes, even though the evidence which is adduced before him is wholly uncontradicted, and shows, beyond any room for dispute or doubt, that the case in any view, is beyond the statutes, and not covered or provided for by them?

That the conduct of the post office is a part of the administrative department of the government is entirely true, but that does not necessarily and always oust the courts of jurisdiction to grant relief to a party aggrieved by any action by the head, or one of the subordinate officials, of that department, which is unauthorized by the statute under which he assumes to act. The acts of all its officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief.

The Land Department of the United States is administrative in its character, and it has been frequently held by this court that, in the administration of the public land system of the United States, questions of fact are for the consideration and judgment of the Land Department, and its judgment thereon is final. Burfenning v. Chicago, St. P., M. & O. R. Co., 163 U. S. 321, 16 Sup. Ct. 1018, 41 L. Ed. 175; Johnson v. Drew, 171 U. S. 93, 99, 18 Sup. Ct. 800, 43 L. Ed. 88, 91; Gardner v. Bonestell, 180 U. S. 362, 21 Sup. Ct. 399, 45 L. Ed. 574.

While the analogy between the above-cited cases and the one now before us is not perfect, yet, even in them it is held that the decisions of the officers of the department upon questions of law do not conclude the courts, and they have power to grant relief to an individual aggrieved by an erroneous decision of a legal question by department officers.

Thus in the Burfenning Case, 163 U. S. 321, 16 Sup. Ct. 1018, 41 L. Ed. 175, a tract of land had been reserved from homestead and pre-emption, and had been included within the limits of an incorporated town, notwithstanding which the Land Department had decided that the land was open to entry, and had granted a patent under the statute relating to homesteads. The court said that "when, by act of Congress, a tract of land has been reserved from homestead and pre-emption, or dedicated to any special purpose, proceedings in the Land Department in defiance of such reservation or dedication, although culminating in a patent, transfer no title, and may be challenged in an action at law. In other words, the action of the Land Department cannot override the expressed will of Congress, or convey away public lands in disregard or defiance thereof."

Here it is contended that the Postmaster General has, in a case not covered by the acts of Congress, excluded from the mails letters addressed to the complainants. His right to exclude letters, or to refuse to permit their delivery to persons addressed, must depend upon some law of Congress, and if no such law exists, then he

cannot exclude or refuse to deliver them. Conceding, arguendo, that when a question of fact arises, which, if found in one way, would show a violation of the statutes in question in some particular, the decision of the Postmaster General that such violation had occurred, based upon some evidence to that effect, would be conclusive and final, and not the subject of review by any court, yet to that assumption must be added the statement that, if the evidence before the Postmaster General, in any view of the facts, failed to show a violation of any federal law, the determination of that official that such violation existed would not be the determination of a question of fact, but a pure mistake of law on his part, because the facts, being conceded, whether they amounted to a violation of the statutes would be a legal question, and not a question of fact. Being a question of law simply, and the case stated in the bill being outside of the statutes, the result is that the Postmaster General has ordered the retention of letters directed to complainants in a case not authorized by those statutes. To authorize the interference of the Postmaster General, the facts stated must, in some aspect, be sufficient to permit him, under the statutes, to make the order.

The facts, which are here admitted of record, show that the case is not one which, by any construction of those facts, is covered or provided for by the statutes under which the Postmaster General has assumed to act, and his determination that those admitted facts do authorize his action is a clear mistake of law as applied to the admitted facts, and the courts, therefore, must have power in a proper proceeding to grant relief. Otherwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law, and is in violation of the rights of the individual. Where the action of such an officer is thus unauthorized, he thereby violates the property rights of the person whose letters are withheld.

In our view of these statutes the complainants had the legal right, under the general acts of Congress relating to the mails, to have their letters delivered at the post office as directed. They had violated no law which Congress had passed, and their letters contained checks, drafts, money orders, and money itself, all of which were their property as soon as they were deposited in the various post offices for transmission by mail. They allege, and it is not difficult to see that the allegation is true, that, if such action be persisted in, these complainants will be entirely cut off from all mail facilities, and their business will necessarily be greatly injured, if not wholly destroyed, such business being, so far as the laws of Congress are concerned, legitimate and lawful. In other words, irreparable injury will be done to these complainants by the mistaken act of the Postmaster General in directing the defendant to retain and refuse to deliver letters addressed to them.

The Postmaster General's order, being the result of a mistaken view of the law, could not operate as a defense to this action on the part of the defendant, though it might justify his obedience thereto until some action of the court. In such a case as the one before us there is no adequate remedy at law, the injunction to prohibit the further withholding of the mail from complainants being the only remedy at all adequate to the full relief to which the complainants are entitled. Although the Postmaster General had jurisdiction over the subject-matter (assuming the validity of the acts), and therefore it was his duty, upon complaint being made, to decide the question of law whether the case stated was within the statute, yet such decision, being a legal error, does not bind the courts.

Without deciding, therefore, or expressing any opinion upon the various constitutional objections set out in the bill of complainants, but simply holding that the admitted facts show no violation of the statutes cited above, but an erroneous order given by the Postmaster General to defendant, which the courts have the power to grant relief against, we are constrained to reverse the judgment of the Circuit Court, with instructions to overrule the defendant's demurrer to the amended bill, with leave to answer, and to grant a temporary injunction as applied for by complainants, and to take such further proceedings as may be proper, and not inconsistent with this opinion. In overruling the demurrer, we do not mean to preclude the defendant from showing on the trial, if he can, that the business of complainants, as in fact conducted, amounts to a violation of the statutes as herein construed.

Judgment reversed.

Mr. Justice WHITE and Mr. Justice MCKENNA, believing the judgment should be affirmed, dissented from the foregoing opinion.

BATES & GUILD CO. v. PAYNE, Postmaster General.

(Supreme Court of United States, 1904. 194 U. S. 106, 24 Sup. Ct. 595, 48 L. Ed. 894.)

Appeal from the Court of Appeals of the District of Columbia to review a decree which reversed a decree of the Supreme Court of the District, enjoining the Postmaster General from enforcing an order denying the admission to the mails of a publication of complainant as second-class mail matter, and dismissed the bill. Affirmed.

This was a bill to compel the recognition by the Postmaster General of the right of the plaintiff corporation to have a periodical publication, known as Masters in Music, received and transmitted through the mails as matter of the second class, and to enjoin defendant from enforcing an order, theretofore made by him, deny-

ing it entry as such. This case took the same course as the preceding ones.

Mr. Justice BROWN delivered the opinion of the court.

The first number of Masters in Music was issued in January, 1903, and an application was immediately made to the Postmaster General for its admission to the mails as second-class mail matter. The application was denied, and plaintiff immediately, and before the issue of another number, filed this bill. The publication purports to be a "monthly magazine," salable at 20 cents per number, and to subscribers at $2 a year. The first number is devoted to the works of Mozart and contains a portrait, a biography of four pages, an essay of ten pages upon his art, and thirty-two pages of his music. The preliminary page contained a notice to the effect that "Masters in Music will be unlike any other musical magazine. Each monthly issue, complete in itself, will be devoted to one of the world's great musicians, giving thirty-two pages of engraved piano music, which will comprise those compositions or movements that represent the composer at his best, with editorial notes suggesting the proper interpretation; a beautiful frontispiece portrait, a life, and estimates of his genius and place in art, chosen from the writings of the most eminent musical critics. The text will thus constitute an interesting and authoritative monthly lesson in musical history; its selections of music will form a library of the world's musical masterpieces, and all at slight cost. * * * The announcement of the contents of the February issue, which will treat of Chopin, will be found on another page."

The Postmaster General placed his refusal to allow this magazine to be transmitted as second-class mail matter upon the ground that each number was complete in itself; had no connection with other numbers save in the circumstance that they all treated of masters in music, and that these issues were in fact sheet music disguised as a periodical, and should be classified as third-class mail matter.

Conceding the principle established in the two cases just decided to be that the fact that books published at stated intervals and in consecutive numbers do not thereby become periodicals, even though in other respects they conform to the requirements of Act March 3, 1879, c. 180, § 14, 20 Stat. 359 (U. S. Comp. St. 1901, p. 2647), cases may still arise where the classification of a certain publication may be one of doubt. Such is this case. But we think that, although the question is largely one of law, determined by a comparison of the exhibit with the statute, there is some discretion left in the Postmaster General with respect to the classification of such publications as mail matter, and that the exercise of such discretion ought not to be interfered with unless the court be clearly of opinion that it was wrong. The Postmaster General is charged with the duty of examining these publications and of determining to which

class of mail matter they properly belong; and we think his decision should not be made the subject of judicial investigation in every case where one of the parties thereto is dissatisfied. The consequence of a different rule would be that the court might be flooded by appeals of this kind to review the decision of the Postmaster General in every individual instance. In the case of American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 104, 23 Sup. Ct. 33, 47 L. Ed. 90, 94, the post-office authorities were held to have acted beyond their authority in rejecting all correspondence with the plaintiff upon the subject of the treatment of diseases by mental action; but while it was said in that case that the question involved was a legal one, it was intimated that something must be left to the discretion of the Postmaster General.

It has long been the settled practice of this court in land cases to treat the findings of the Land Department upon questions of fact as conclusive, although such proceedings involve to a certain extent, the exercise of judicial power. As was said in Burfenning v. Chicago, St. P., M. & O. R. Co., 163 U. S. 321, 323, 16 Sup. Ct. 1018, 1019, 41 L. Ed. 175, 176: "Whether, for instance, a certain tract is swamp land or not, saline land or not, mineral land or not, presents a question of fact not resting on record, dependent on oral testimony; and it cannot be doubted that the decision of the Land Department, one way or the other, in reference to these questions, is conclusive, and not open to relitigation in the courts, except in those cases of fraud, etc., which permit any determination to be re-examined" (citing cases). See also Johnson v. Drew, 171 U. S. 93, 18 Sup. Ct. 800, 43 L. Ed. 88; Gardner v. Bonestell, 180 U. S. 362, 21 Sup. Ct. 399, 45 L. Ed. 574.

But there is another class of cases in which the rule is somewhat differently, and perhaps more broadly, stated, and that is, that where Congress has committed to the head of a department certain duties requiring the exercise of judgment and discretion, his action thereon, whether it involve questions of law or fact, will not be reviewed by the courts unless he has exceeded his authority or this court should be of opinion that his action was clearly wrong. In the early case of Decatur v. Paulding, 14 Pet. 497, 10 L. Ed. 599, it was said that the official duties of the head of an executive department, whether imposed by act of Congress or resolution, are not mere ministerial duties; and, as was said by this court in the recent case of United States ex rel. Riverside Oil Co. v. Hitchcock, 190 U. S. 324, 23 Sup. Ct. 702, 47 L. Ed. 1076: "Whether he decided right or wrong is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever, under those circumstances, to review his determination by mandamus or injunction."

In Marquez v. Frisbie, 101 U. S. 473, 476, 25 L. Ed. 800, 801, which was a bill in equity to review the decision of the Land Department in a pre-emption case, Mr. Justice Miller remarked: "This means, and it is a sound principle, that where there is a mixed question of law and fact, and the court cannot so separate it as to see clearly where the mistake of law is, the decision of the tribunal to which the law had confided the matter is conclusive." In Gaines v. Thompson, 7 Wall. 347, 19 L. Ed. 62, it was held that the court would no more interfere by injunction than by mandamus to control the action of the head of a department; and in United States ex rel. Dunlap v. Black, 128 U. S. 40, 9 Sup. Ct. 12, 32 L. Ed. 354, it was said that the courts will not interfere by mandamus with the executive officers of the government in the exercise of their ordinary official duties, even where those duties require an interpretation of the law, no appellate power being given them for that purpose. See, also, United States ex rel. Redfield v. Windom, 137 U. S. 636, 11 Sup. Ct. 197, 34 L. Ed. 811.

The rule upon this subject may be summarized as follows: That where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and that even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they may have the power, and will occasionally exercise the right of so doing.

Upon this principle, and because we thought the question involved one of law rather than of fact, and one of great general importance, we have reviewed the action of the Postmaster General in holding serial novels to be books rather than periodicals; but it is not intended to intimate that in every case hereafter arising the question whether a certain publication shall be considered a book or a periodical shall be reviewed by this court. In such case the decision of the Post-Office Department, rendered in the exercise of a reasonable discretion, will be treated as conclusive.

In the case of Masters in Music the question really is whether a pamphlet, complete in itself, treating of the works of a single master, with a greater part of the pamphlet devoted to specimens of his genius, shall be controlled by the cover, which declared that these numbers will be issued monthly, at a certain subscription price per year. Although a comparison of the exhibit with the statute may raise only a question of law, the action of the Postmaster General may have been, to a certain extent, guided by extraneous information obtained by him, so that the question involved would not be found merely a question of law, but a mixed question of law and fact. While, as already observed, the question is one of doubt, we think the decision of the Postmaster General, who is vested by Congress

with the power to exercise his judgment and discretion in the matter, should be accepted as final.

The decree of the Court of Appeals is therefore affirmed.

Mr. Justice HARLAN, with whom concurred the CHIEF JUSTICE (dissenting).

The CHIEF JUSTICE and myself are of opinion that the publication here in question is second-class mailable matter, and cannot concur in the opinion and judgment of the court. Our reasons for dissenting are stated in the opinion filed by us in Houghton v. Payne (just decided) 194 U. S. 88, 24 Sup. Ct. 590, 48 L. Ed. 888.

But there are some things in the opinion of the court in this case to which we shall advert. It is said that the case is one of doubt. Now, it was admitted at the bar by the government that the publication known as Masters in Music would be carried in the mails as second-class matter if the question be decided in accordance with the construction placed upon the statute by the department for more than sixteen years continuously prior to the present ruling of the department. We had supposed it to be firmly settled that the established practice of an executive department charged with the execution of a statute will be respected and followed—especially if it has been long continued—unless such practice rests upon a construction of the statute which is clearly and obviously wrong. In United States v. Philbrick, 120 U. S. 59, 7 Sup. Ct. 413, 30 L. Ed. 561, which involved the construction placed by an executive department upon an act of Congress, this court said: "Since it is not clear that that construction was erroneous, it ought not now to be overturned." So in United States v. Healey, 160 U. S. 145, 16 Sup. Ct. 247, 40 L. Ed. 372, the court said that it would accept the uniform interpretation by the Interior Department of an act relating to the public lands, "as the true one, if, upon examining the statute, we found its meaning to be at all doubtful or obscure."

The authorities to that effect are numerous. Edwards v. Darby, 12 Wheat. 206, 6 L. Ed. 603; Hahn v. United States, 107 U. S. 402, 2 Sup. Ct. 494, 27 L. Ed. 527; United States v. Graham, 110 U. S. 219, 3 Sup. Ct. 582, 28 L. Ed. 126; Brown v. United States, 113 U. S. 571, 5 Sup. Ct. 648, 28 L. Ed. 1080; United States v. Philbrick, 120 U. S. 59, 7 Sup. Ct. 413, 30 L. Ed. 561; United States v. Johnston, 124 U. S. 236, 8 Sup. Ct. 495, 31 L. Ed. 415; United States v. Hill, 120 U. S. 183, 7 Sup. Ct. 510, 30 L. Ed. 632; United States v. Finnell, 185 U. S. 236, 22 Sup. Ct. 633, 46 L. Ed. 890; United States v. Alabama G. S. R. Co., 142 U. S. 615, 12 Sup. Ct. 306, 35 L. Ed. 1134; Hewitt v. Schultz, 180 U. S. 139, 157, 21 Sup. Ct. 309, 45 L. Ed. 463, 472. Some of them are cited in the opinion of the court in Houghton v. Payne. The rule of construction which this court has recognized for more than three-quarters of a century is now overthrown. For, it is adjudged that the practice of the

Post-Office Department, covering a period of sixteen years and more, need not be regarded in this case, although the construction of the statute in question is admitted to be doubtful. We cannot give our assent to this view.[46]

[46] See Houghton v. Payne, 194 U. S. 88, 24 Sup. Ct. 590, 48 L. Ed. 888 (1904); Payne v. United States ex rel. Railway Publ'g Co., 20 App. D. C. 581 (1902).

See T. R. Powell, Conclusiveness of Administrative Determinations in the Federal Government, American Political Science Review, I, p. 583.

Cases in this collection illustrating appeal to courts in matters relating to postal administration: Teal v. Felton, 12 How. 284, 13 L. Ed. 990 (1851); Teal v. Felton, 1 N. Y. 537, 49 Am. Dec. 352 (1848); U. S. v. Griswold, 8 Ariz. 453, 76 Pac. 596 (1904); Whitfield v. Lord Le Despencer, Cowp. 754 (1778); Keenan v. Southworth, 110 Mass. 474, 14 Am. Rep. 613 (1872); U. S. v. Pearson (C. C.) 32 Fed. 309 (1887).

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